Superior Court, Montreal,

13TH, 14TH, 15TH AND 16TH NOVEMBER, 1861.

BEFORE

THE HON. MR. JUSTICE BADGLEY,

AND

A SPECIAL JURY.

HOOPER *vs.* LESLIE,

A

FULL AND COMPLETE REPORT,

FROM

THE RECORD, THE ARGUMENTS OF COUNSEL, THE CHARGE, &c.

COLLATED BY J. G. K. HOUGHTON,
STUDENT AT LAW.

Montreal:
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1861.

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Superior Court, Montreal.

ANGUS C. HOOPER,

Plaintiff,

vs.

EDWARD S. LESLIE AND PATRICK LESLIE,

Defendants.

Before the Hon. Mr. Justice BADGLEY, and a Special Jury.

Mr. LAFLAMME, Mr. JOHNSON, Q.C., and Mr. STUART, for the Plaintiff.

Mr. ABBOTT, M.P.P., and the Hon. A. A. DORION, for the Defendants.

Messrs. LAFLAMME, LAFLAMME & DALY, Attorneys for Plaintiff.

Messrs. ABBOTT & DORMAN, Attorneys for Defendants.

The action was for malicious prosecutio

The Bank of British North America, the Bank of Montreal, and the Molsons Bank, simultaneously commenced proceedings against the Defendants by writs of *saisie arret* before Judgment, issued on the 17th March, 1860. The respective Cashiers of each Bank swore to the usual affidavit. Mr. Hooper, on behalf of the Bank of British North America, swore that "he was credibly informed, had reason to "believe, and did verily and in his conscience believe, that the "Defendants, Leslie and Company, had secreted and were immediately "about to secrete their estate, debts and effects with intent to defraud "their creditors, and the said Bank of British North America; "and that without the benefit of a writ of *saisie arrêt* before Judgment "the said Bank would lose their debt or sustain damage." Upon this the Defendants, on the 28th of the same month, made oath before a magistrate, that Mr. Hooper had wilfully, corruptly &c., &c., sworn

to the said affidavit knowing it to be false, and on the 29th of the same month a bill of indictment for perjury was preferred against Mr. Hooper at the instance of the Defendants, but was found "No Bill." He thereupon brought his action of damages against the Defendants for $20,000, praying for *contraint par corps.*

The Defendants pleaded in effect, that previous to the swearing of the affidavit of Mr. Hooper, they had made an assignment of all their estate and effects to provisional assignees for the benefit of their creditors; with the option to the creditors of naming their own assignees in place of the provisional assignees; upon the sole condition that they should receive a discharge from their liabilities: and that they had in every respect acted *bonâ fide*, honestly, and correctly. That Mr. Hooper was perfectly aware of all this when he made his affidavit, and therefore that they had reasonable and probable cause for causing the bill of indictment to be preferred.

Mr. Laflamme, followed by Mr. Johnson, Q.C., opened the case for the Plaintiff, and the case was thus proceeded with.

The affidavit of the Defendants was put in, admitted, and read to the Jury.

INTERROGATORIES SUR FAITS ET ARTICLES.

Interrogatories sur Faits et Articles submitted to Edward Stuart Leslie.

1. Is not your name Edward Stuart Leslie, and are you not one of the Defendants in this cause?—Yes.

2. Were you not, in January eighteen hundred and sixty, carrying on business in Montreal in partnership with Patrick Leslie, under the name, style and firm of Leslie & Co., and had you not so carried on business for more than a year previous to that date? If not, state for what period.—Yes.

3. Did not the said firm of which you were a member, become bankrupt on or about the fifteenth day of January eighteen hundred and sixty? If not, state from what time; and have you not since been, and are you not still insolvent?—Yes.

4. Was not the firm to which you so belonged largely indebted to several individuals, merchants and traders, mercantile firms, and banks, when your said insolvency took place?—Yes.

5. Were not you and Patrick Leslie, when you so became insolvents, indebted to the said several creditors in a sum exceeding one hundred thousand dollars?—Yes.

6. When your said insolvency took place, were you not owing to the Bank of British North America the sum of thirty-seven thousand

eight hundred and twenty-one dollars and seventy-seven cents? If not, state what amount.—I think that we owed about that amount.

7. Did not the liabilities of your firm exceed its assets in a proportion of over three fourths at the time you declared your insolvency? If not, state the exact proportion.—Our assets nominally at that time very much exceeded that proportion, and after the deduction of bad and doubtful debts they would not realize that sum.

8. Previous to your declared insolvency, were not the Hon. James Leslie, your father, and Henry Starnes, Esq., members of the copartnership which existed between you and your brother, the other defendants?—Up to the thirty-first of March eighteen hundred and forty-eight the partnership consisted of James Leslie, Henry Starnes, Edward Stuart Leslie, (that is myself,) one of the defendants, and Patrick Leslie, (the other defendant,) and from the first of April eighteen hundred and forty-eight up to the 1st of May eighteen hundred and fifty-eight the partnership consisted of Henry Starnes, myself and the other Defendant, and from this last date up to January eighteen hundred and sixty, the partnership consisted of myself and the other Defendant.

9. Is it not true that since the Hon. James Leslie left or retired from the firm, no loss was experienced by your firm to justify the deficiency in the assets as shown by your statements furnished to the creditors? If not, state what loss you incurred.—No, it is not true. I cannot state the amount of the losses, but they were sufficient to reduce our estate to the position it was in at the time of our failure.

10. Is it not true that after the withdrawal of Henry Starnes, Esq., from your firm, a sum of over thirty-eight thousand dollars was paid by your firm to withdraw paper of the firm of Leslie, Starnes & Co., to wit the firm of which the said Henry Starnes was a member, jointly with you and the other Defendants?—The sum of thirty-eight thousand dollars was paid on account of the late firm. Mr. Starnes also paid a large amount on account of similar paper after the dissolution.

11. Is it not true that when the said Henry Starnes left your firm, you were insolvent? Did not your liabilities exceed your assets?—To the best of my knowledge, it is not true.

12. Is it not true that no balance was ever made of the account and state of the firm when the said Henry Starnes left it?—There was no balance made at that time.

13. Is it not true that since the said Henry Starnes left your firm you have not experienced in your business any loss accounted for in your books?—No; to the best of my belief it is not true.

14. Is it not true that you cannot account for the deficiency in your assets of fifty thousand dollars and over, since the said Henry Starnes left your firm? If you can, state exactly and precisely how you account for the same.—No, it is not true. A statement of our business and the nature of our losses are shewn by the statement hereby produced marked with the letter Z.

15. When you became bankrupt, were you not called upon by your creditors, or by some one on their behalf, for explanations with regard to the state of your affairs and books; and is it not truethat you never complied with such request? No, we were called upon by some of our creditors, and gave every explanation in our power.

16. Is it not true that previous to that, between the first and twenty-first of February, 1860, the accountants selected by the creditors, namely, Messrs. Greenshields & Johnson, repeatedly requested from you explanations on your business, generally, and for subsequent books and papers, which you promised to give or furnish? No it is not true; we gave all the information in our power up to the date of the assignment. We made no promise which we did not fulfil.

17. Is it not true that you never did furnish the information required by said Messrs. Greenshields & Johnson, and that you did not give them the books asked for the purpose of completing the investigation of your affairs?—No, after the assignment we were asked for all the papers and vouchers of every kind in our possession, and as Messrs. Greenshields & Johnson had made incorrect and unfounded statements against us, we did not think ourselves justified in placing ourselves entirely in their power, and therefore declined to deliver up any but the regular books of account.

18. Is it not true the Plaintiff in this cause is the Manager of the Bank of British North America, a creditor of your bankrupt firm, for a large amount?—Yes.

19. Did the Plaintiff represent and act for the said Bank of British North America, as one of your creditors?—Yes.

20. Is it not true that the said Plaintiff never had any interest in the claim of the said bank against you?—I do not know. He was doubtless interested to get into favour with his employers.

21. Did you not sell to your father, the Honorable James Leslie, on or about the 11th February, 1860, or say at what time, at Montreal, by deed or instrument before witnesses, W. Bleakley and James Morison, under private seal executed on or bearing that date, certain lots of land belonging to you, situate in Wolfe Island and Howe Island, in the County of Frontenac, in the Province of Canada, being lots num-

bers sixteen, twenty-five and twenty-six, old survey, lot number four, in the second concession, lot number one, in the third concession, the east half of lot number two, in the eighth concession, part of lots numbers four and five, in the ninth concession, lot number two, in the tenth concession, lot number two, in the eleventh concession, and lot number two, in the twelfth concession, all north of the Basset Line, also lot number one, in the first concession, lots number one and two in the second concession, lots number one and two, in the third concession, lot number one, in the fourth concession, lots number four and five, in the sixteenth concession, lots number four and five, in the eighteenth concession, lots number six and seven, in the nineteenth concession, lots numbers seven, eight, nine and ten, in the twentieth, lot number eight, in the twenty-first concession, all south of the Base Line, in the said Township of Wolfe Island, containing by admeasurement four thousand acres of land, be the same more or less, and also all your estate in the following, and being in the said Township of Howe Island, in the said County of Frontenac, being composed of lots numbers one, two, three, four, five, six, seven and eight, and the west part of lot number nine, south of the road, containing by admeasurement eleven hundred acres of land, be the same more or less, and was not this sale so made by you for the sum of £3000 mentioned in the said deed of sale, and is it not mentioned in the said instrument that this sum was in hand paid to you?—I executed a deed on the date, and for the purpose mentioned in this question, but I could have no interest in those lands till after the death of my father. The price was represented by three notes of £1000 each, which is mentioned in the schedule of my individual estate annexed to the deed of assignment. Almost all those lands were subject to long leases.

22. Is it not true that your father, the said Honorable James Leslie, was a creditor of your firm for a large amount and state it?—Yes for about $28,000 more or less.

23. Were not the lands sold by you to your father of a much greater value than three thousand pounds?—No, the price named in the deed was the full value of my interest in them.

24. Did you not receive on the part of the Bank of British North America, and your creditors generally, on the ninth day of March, 1861, a notification and protest through the ministry of Mr. Gibb and his Colleague, Notaries Public, requesting you and your brother, the other defendant, to make a full, complete and unconditional assignment (*cession de biens*) of all the partnership and individual estates, for the benefit of your creditors to Messrs. William Workman, Tho-

mas Ryan, Edward Maitland, and the Honorable James Leslie, selected by the creditors or the majority of them to receive such assignment for them and on their behalf, and did not the said creditors inform you by the said notice and protest that if the said assignment and full delivery of your assets were made and satisfactory explanations given by you of the losses, and deficiencies in your assets and of the entries in your books and after examination made of your books by approved accountants, one to be named by your said firm and the other by the creditors, that a final discharge would be granted to you by the said creditors and did you not reply that you had already made an assignment of your estate for the benefit of your creditors of which they had been duly informed or something to that effect?—No. In the month of March, 1860, a notification by part of our creditors among whom was the Bank of British North America, a copy of which is fyled in this cause, but no other, was served upon us.

26. Did you not on or after the eighth day of March, 1860, receive intimation from your creditors or the majority of them, and amongst them, from the Bank of British North America, that after elucidating the statements furnished by the creditors by approved accountants, one to be named by you, and another by the creditors and upon every asset being surrendered and all deficiencies satisfactorily explained a discharge would be granted to you?—My answer to this interrogatory is the same as that given to last preceding interrogatory.

26, Did you not on the 26th March 1860, make an affidavit before J. A. Labadie Esquire, in Montreal, one of the justices of the peace, to the effect that the said Plaintiff had maliciously, wilfully & corruptly and without any reasonable or probable cause sworn to a certain affidavit the truth of which you denied, and did you not on the 29th March 1860 cause to be exhibited or preferred in the Court of Queen's Bench a certain bill of indictment declaring in substance and effect that the said Plaintiff had committed the crime of perjury?—I made an affidavit in March 1860 of the purport of this interrogatory and a bill of indictment of the Plaintiff was preferred in the same month with my sanction but I do'nt remember the date.

27. Look at the copy of indictment fyled by the said Plaintiff with his declaration as his Exhibit number one and state if that document is not a copy of the indictment preferred against the said Plaintiff? I never read the indictment and I dont know whether Plaintiff's Exhibit No. 1 is a copy of it or not.

28. Were you not the prosecutor or the party who caused the said indictment to be preferred against the said Plaintiff: if not, state who

was the prosecutor and at whose request you did give evidence before the Grand Jury?—I have already answered that—I sanctioned the bill and gave information before the Grand Jury of my own accord.

(*The questions were signed*)

LAFLAMME, LAFLAMME & DALY,
Attorneys for Plaintiff.

(*The answers were signed*)

E. S. LESLIE.

INTERROGATORIES SUBMITTED TO DEFENDANT, P. LESLIE, IN THIS CAUSE.

1. Is not your name Patrick Leslie; and are you not one of the Defendants in this cause?—It is, and I am one of the Defendants.

2. Were you not, in January, 1860, carrying on business in Montreal in partnership with Edward Stuart Leslie, under the name, style and firm of Leslie & Co.; and had you not so carried on business for more than a year previous to that date? If not, state for what period.—Yes.

3. Did not the said firm of which you were a member become bankrupt on or about the fifteenth day of January, 1860? If not, state from what time, and have you not since been, and are you not still insolvent.—Yes.

4. Was not the firm to which you so belonged largely indebted to several individuals, merchants and traders, mercantile firms and banks, when your said insolvency took place? Yes.

5. Were not you and Edward Stuart Leslie, when you so became insolvent, indebted to the said several creditors in a sum exceeding $100,000.—Yes.

6. When your said insolvency took place, were you not owing to the Bank of British North America the sum of $37,821$\frac{70}{100}$. If not, state what amount. Yes, something about that amount.

7. Did not the liabilities of your firm exceed its assets in a proportion of over three-fourths at the time you declared your insolvency? If not, state the exact proportion. Numerically they did not appear, making allowances for bad debts and losses they were much under.

8. Previous to your declared insolvency, were not the Hon. James Leslie, your father, and Henry Starnes, Esq., members of the copartnership which existed between you and your brother, the other

Defendant?—My father retired from the firm in 1848. The business was continued by Mr. Starnes, my brother and myself; and since this last period, 1858, the business was carried on by my brother, the other defendant in this cause, and myself.

9. Is it not true that since the Honorable James Leslie left or retired from the firm, no loss was experienced by your firm to justify the deficiency in the assets as shown by your statement furnished to the creditors? If not, state what loss you incurred?—It is not true. The losses incurred were such as to cause our failure.

10. Is it not true that after the withdrawal of Henry Starnes, Esquire, from your firm, a sum of over thirty-eight thousand dollars was paid by your firm to withdraw paper of the firm of Leslie, Starnes & Co., to wit, the firm of which the said Henry Starnes was a member jointly with you and the other Defendant?—About that amount was paid by us as also a large sum by Mr. Starnes for the same purpose.

11. Is it not true that when the said Henry Starnes left your firm you were insolvent? Did not your liabilities exceed your assets? —To the best of my belief it is not the case.

12. Is it not true that no balance was ever made of the account and state of the firm when the said Starnes left it?—No balance sheet was made.

13. Is it not true that since the said Henry Starnes left your firm, you have not experienced in your business any loss accounted for in your books?—No, it is not true.

14. Is it not true that you cannot account for the deficiency in your assets of fifty thousand dollars and over, since the said Henry Starnes left your firm? If you can, state exactly, fully and precisely how you account for the same?—It is not true, this document which I now produce, marked with the letter H, will shew that.

15. When you became bankrupts, were you not called upon by your creditors, or by some one on their behalf, for explanations with regard to the state of your affairs and books, and is it not true that you never complied with such request?—It is not true. Every information that was called for was given.

16. Is it not true that previous to that, between the first and twenty-first February Eighteen hundred and sixty, the accountants selected by the Creditors, namely, Messrs. Greenshields and Johnson, repeatedly requested from you, explanations on your business generally and for subsidiary books and papers which you promised to give and furnish?—No, it is not true. Every information asked for was given in even after the assignment was made.

17. Is it not true that you never did furnish the information required by the said Messrs. Greenshields and Johnson and that you did not give them the books asked for the purpose of completing the investigation of your affairs?—No, it is not true. All books and documents of the business when requested were furnished.

18. Is not the Plaintiff in this cause the manager of the Bank of British North America the creditor of your Bankrupt firm for a large amount?—Yes.

19. Did the Plaintiff represent and act for the said Bank of British North America, as one of your creditors?—Yes.

20. Is it not true that the said Plaintiff never had any interest in the claim of the said Bank against you?—I do not know.

21. Did you not receive on the part of the Bank of British North America and your creditors generally on the 9th day of March, 1861, a notification and protest through the ministry of Mr. Gibb and his colleague, Notaries Public, requesting you and your brother, the other Defendant to make a full, complete, and unconditional assignment *(cession de biens)* of all the partnership and individual estates for the benefit of your creditors to Messrs. William Workman, Thomas Ryan, Edward Maitland, and the Honorable James Leslie selected by the creditors or the majority of them to receive such assignment for them, and on their behalf, and did not the said creditors inform you by the said notice and protest that if the said assignment and a full delivery of your assets were made and satisfactory explanations given by you of the losses and deficiencies in your assets and of the entries in your books, and after the examination made of your books by approved accountants, one to be named by your said firm, and the other by the creditors that a final discharge would be granted to you by the said creditors; and did you not reply that you had already made an assignment of your estate for the benefit of your creditors of which they had been duly informed or something to that effect?—No. A document dated the ninth day of March, 1860, signed by some of the creditors of our firm, among which was the Bank of British North America, and a copy of which is fyled in this case was served upon our firm.

22.—Did you not on or after the 8th of March 1860 receive instructions from your creditors or the majority of them and amongst others from the Bank of British North America that after elucidating the statements furnished by you to the creditors, by approved accountants, one to be named by you and another by the Creditors, and upon every asset being surrendered and all deficiencies satisfactorily explained, a discharge would be granted to you?—No, I have no recollection of it.

23.—Have you not married the daughter of Alexander Maurice Delisle, one of the Provisional Assignees to whom you made over your estate, by the deed of the 23rd February 1860?—Yes.

24.—Is it not true that the Superior Court of Montreal, by its judgment rendered on the 28th February last past, in the case wherein Damase Masson was Plaintiff against you, has declared that your wife Dame Elmire Delisle had no right to claim any dower, and had no claim against your estate for the alleged settlement or donation contained in your marriage contract?—My legal advisers informed me of some such judgment which has been appealed from.

25.—Did you not on the 28th day of March 1860 make affidavit before J. A. Labadie Esquire in Montreal, one of the Justices of the peace, to the effect that the said Plaintiff had maliciously, wilfully and corruptly and without any reasonable or probable cause sworn to a certain affidavit, the truth of which you denied, and did you not on the twenty ninth day of March 1860 cause to be exhibited or preferred in the Court of Queen's Bench a certain Bill of Indictment declaring in substance and effect that the said Plaintiff had committed the crime of perjury? An affidavit was made but I can't state the date of such affidavit.

26.—Look at the Copy of Indictment fyled by the said Plaintiff with his declaration as his Exhibit number one, and state if that document is not a copy of the Indictment preferred against the said Plaintiff.—I never saw it, so I cannot say.

27.—Were you not the prosecutor or the party who caused the said Indictment to be preferred against the said Plaintiff? If not state who was the prosecutor and at whose request you did give evidence before the Grand Jury?—The indictment was brought against the plaintiff with my knowledge and I gave evidence before the Grand Jury.

(The Questions were signed.)

LAFLAMME, LAFLAMME & DALY.
Attorneys for Plaintiff.

(*The Answers were signed*) P. LESLIE.

ALEXANDER MORRIS DELISLE, Esquire.—Is Clerk of the Crown for the District of Montreal. As such has possession of indictments. (Produces original indictment preferred against Plaintiff in March, 1860.) Knows the Plaintiff. Did not know him then. Has no doubt Plaintiff is the person mentioned in the indictment. Has examined copy of indictment produced in this cause, and says it is

a true examined copy. In this instance the Defendants were prosecutors. The bill of indictment aforesaid was presented to the Grand Jury on the 29th March, 1860. Directs Registrar's proceedings as Clerk of the Crown. It was returned by Grand Jury as aforesaid, "No Bill." No record of the proceedings kept until the return of the bill before the Court. Can't say what witnesses were examined; presumes those on back of indictment were examined. Witness was a witness on such indictment. Was not present in Grand Jury room when Defendants were examined by Grand Jury. When witness was examined was alone in room with Grand Jury, There was what is frequently done, a lawyer to marshal the evidence. We examined Mr. Delisle, witness, and the other witnesses. Hon. L. T. Drummond was present in Jury room to marshal evidence. Said Mr. Drummond was employed on behalf of Defendants in this cause.

Cross-examined.—No questions by Defendants.

JOHN A. CONVERSE.—Was a member of Grand Jury at city of Montreal, serving there in March, 1860. Knows Defendants. Remembers bill of indictment brought against Plaintiff for perjury before Grand Jury in March, 1860. Does not remember any other indictment against Plaintiff. Defendants were examined as witnesses upon such indictments. The Notary of the Seminary, witness believes, was foreman of Jury. The Hon. L. T. Drummond and Mr. Delisle appeared before Grand Jury also. Does not recollect any other lawyer than Mr. Drummond appearing before Grand Jury that term. Does not remember ever seeing a lawyer appearing in such capacity before Grand Jury. Has no doubt Plaintiff was person mentioned in such indict ment.

Cross-examined. Question of Defendants whether Grand Jury differed in opinion. Overruled.

THOMAS R. JOHNSON.—Is an accountant. Is in partnership with Henry Greenshields; was in partnership with him in March, 1860. Was called on by creditors of Defendants to examine books of their firm, at end of January, or beginning of February, 1860. Found books in a very imperfect state. Is a professional accountant. Books were delivered to him by Defendant, Edward S. Leslie. Does not know exact number of books. Witness gave receipt to said Leslie for said books. Our report, (that is of witness and his partner, Greenshields) at the time, embraced everything witness had to say on the matter. Witness takes communication of Minute Book of creditors, and finds it contains the report witness and

Greenshields furnished at the time. The report is shewn to witness, and he acknowledges his signature thereto. Identifies report, part of Defendant's Exhibit, marked B. Reads report to the Jury. It begins by "To Messrs. WORKMAN, &c." Said report is dated the 25th day of February, 1860. Does not know the exact time he had the Defendants' books in his possession,—about a month, or perhaps a little more. Himself called once or twice at Defendant's place for information and books, and sent a clerk several times. The Defendants answered, first, they had not got them together yet; the books were not kept at all in a business-like manner. They were pretended to be kept by double entry; but no balance sheet was ever shewn to balance books. Certain entries were made in books by which he understood there had been change in firm, by retirement of Mr. Starnes, but not complete. Did not see that balance sheet was struck upon retirement of said Starnes. It was impossible for a professional accountant to establish state of Defendants' business from said books; what was wanting for such were the auxiliary books and papers mentioned in report. They may be easily had if parties are willing to give them. Can't say how long he asked for books as aforesaid; did so from time to time. He parted with books on account of notarial demand for such books—not certain whether it was notarial. Remembers Mr. Delisle called for them. Books asked for several times. It was at time that he was asking Defendants for the books that Defendants issued writ of attachment to have the books. Witness and partner did all in their power to get information required for creditors. The general purport of the report was mentioned in conversations at times before report was made, at meeting of creditors: acted as joint secretary with partner at meetings of creditors. The creditors were discovered by him and partner from what they learned from Defendants. Said creditors were all notified to be at meetings. The committee was appointed at meeting at Defendants' office; after that Mr. Workman one of the committee employed witness on the part of the creditors. The names of creditors at such meetings are mentioned in minute book of the meetings produced. The creditors mentioned in Schedule D, forming part of the deed of assignment shewn to witness received notice to attend meetings of creditors. The creditors, witness believes, demanded an assignment from the Defendants. There was a resolution made to that effect by the creditors. The minute book of creditors of Defendants having been shewn to witness and he having read the minutes of the meeting of the 8th March, 1860, to Jury, witness says that he was prevent at such meeting and took the minutes thereof.

A copy of the resolution passed at that meeting requesting the Defendants to make an assignment in favour of said creditors, was served upon the Defendants by a messenger either upon the said 8th March, 1860, or the following day. They answered said creditors in writing which writing witness believes is fyled in this cause. Witness is not acquainted personally with this answer—Plaintiff's exhibit No. four, (notarial demand upon Defendants' protest of 9th March, 1860,) fyled with his answers being read, he declares was executed in accordance with the resolution of the creditors of Defendants demanding assignment. Witness wishes to correct his testimony by stating that the notice above mentioned as having been served upon the Defendants in consequence of a resolution passed by those creditors at a meeting of the 8th March, 1860, was served upon said Defendants in consequence of a resolution passed at a meeting of said creditors on the 25th February, 1860, and that the protest served upon the Defendants was in consequence of a resolution of the 8th March, 1860.

Cross-examined.—Had day book, journal, ledger, cash book, and one or two blotters and bill books, belonging to Defendants at time above referred to. Had some check books but not all. He is not certain about cheque books. Had ordinary account books incomplete. The report explains in what said books were incomplete. Witness means by auxiliary books in his report, cheque books and bank books. Had ordinary account books except those last mentioned. The books which witness had were books of the partnership, Leslie & Co., but there was one book which was continued from the old firm Leslie, Starnes & Co., spoken of in examination in chief. There were transfers from the books of Leslie, Starnes & Co., of debits and credits; crediting the former firm with assets and debiting them with liabilities. All the liabilities were not entered to the debit of the late firm. Does not know in whose handwriting books were kept. Should say books were not kept in such a manner as a competent book keeper would have kept them—was informed that Defendants themselves had kept their books—does not recollect when Defendants first demanded of witness and partners to return their books. The letter of demand of books by Defendants having been shewn to witness he says the books were demanded at date of same, the 27th February, 1860.

MONTREAL, 27th February, 1860.

Messrs. GREENSHIELDS & JOHNSON,

Gentlemen,—Your report having been made to our creditors upon your audit of our books we shall feel much obliged by your return-

ing them per bearer. We trust you will not consider us unreasonable in this request, as they have now been in your possession for nearly a month. We beg, however, to say that free access may be had to them for the elucidation of any matter not yet sufficiently understood.

We are, &c., &c.,

(Signed,) LESLIE & Co.,

The written answer of witness and partner to such demand, dated 28th February, 1860, having been shewn to witness he identifies it.

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32 Little St. James Street,

MONTREAL, 28th February, 1860.

Messrs. LESLIE & Co.,

Gentlemen,—In answer to your letter of 27th instant, we beg to state, that as the books were handed to your creditors, and to us, for a certain purpose, namely, to examine, audit, and report upon them, and as this has only been partially done in consequence of want of information agreed to be furnished by you, we would not feel justified in returning them until the object for which they were placed in our hands has been accomplished, without the consent of the creditors.

We are, Very respectfully,

Your obdt. servants,

(Signed,) GREENSHIELDS & JOHNSON.

Witness says the demand for books was made after the deed of provisional assignment had been executed and a copy thereof served upon witness and partner and referred to creditors. Is not certain of date of delivery of such copy. The minute book produced yesterday contains a correct statement of proceedings of the creditors of Leslie & Co., at such meetings and the dates of these meetings. Witness after referring to the minute of the meeting of creditrrs of the 25th February, 1860, says that the resolution therein contained referring to the provisional assignment was passed at the meeting,

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"It was moved by Thomas Ryan, Esq., seconded by D. Torrance, Esq.—Resolved, That the deed of assignment as submitted by Mesrs. Leslie & Co.,—which has been read to the meeting is unsatisfactory to the creditors.

The resolution being put to the meeting passed unanimously."

Plaintiff was present at meeting of the 25th February, 1860. Has no doubt that a copy of provisional assignment had been communicated to creditors of Leslie & Co., as appears by minute of said meetings. At that meeting of the 2 th February, 1860, William Workman, Edward Maitland, Thomas Ryan, and Hon. James Leslie were named on the part of the creditors to receive assignment from Leslie & Co. Believes the said Hon. James Leslie then named was the same Mr. Leslie named in deed of provisional assignment and knows no other Hon. James Leslie.

"It was moved by George Moffatt, jun., Esq., seconded by James Torrance, Esq., and resolved,

That Messrs. Leslie & Co. be called upon to make an unconditional assignment of the entire property of the firm as well as that of the individual partners, to Messrs. William Workman, Edward Maitland, Thomas Ryan, and the Hon. James Leslie, for the benefit of their creditors.

The resolution being put to the meeting passed unanimously.

It was moved by Mr. Hooper seconded by Mr. Scott, and resolved,

"That the secretary, Mr. Johnson, be instructed to transmit copy of the proceedings of this meeting to Messrs. Leslie & Co., and to request their immediate reply.

Witness says that he transmitted a copy of proceedings of said meeting to said Leslie & Co. Witness identifies letter here produced, dated twenty fifth February, 1860, which accompanied the delivery of said last copy of proceedings.

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32 Little St. James Street,
Montreal, February 25, 1860.

MESSRS. LESLIE & Co.,
Montreal.

Gentlemen,

At a meeting of your creditors held this day, I am instructed by Resolution to furnish you with a copy of proceedings. In accordance with that resolution, I herewith transmit you copy and wait for your early reply.

I am, gentlemen, your obedient servant,
THOMAS R. JOHNSON, *Secretary.*

The report of witness and partner, read to Jury on affairs of Leslie & Co., was submitted to creditors at said meeting and formed part of proceedings thereof. Identifies copy of letter of 27th February, 1860, as copy of letter sent by defendants to witness and partner after receiving copy of said proceedings of meeting of 25th February, 1860.

Montreal, February 27th, 1860.

Sir,—We beg to acknowledge the receipt of your favour of the 25th instant enclosing a copy of the proceedings at a meeting of our creditors held on that day. We regret to

perceive that the creditors are under an impression that we have withheld, or are unwilling to furnish, any information they may require. We beg most sincerely to assure them that such is not the case, and that we are prepared at any moment to give them all the explanations in our power.

We also perceive that the proceedings have been in some respect based upon a report of Messrs. Greenshields and Johnson, of the purport of which we are completely ignorant. We would respectfully suggest to our creditors that we are in fairness entitled to a copy of this report, that we may know the precise nature of the objections made to our statements and books; and we have no doubt whatever that on our books being returned to us, we shall be able, as we assure you we are most willing, fully to explain any apparent errors or discrepancies.

We are, &c.,

(Signed,) LESLIE & Co.

THOMAS R. JOHNSON, Esq.,
Secretary.

The intervening day was a Sunday.—Believes did not transmit copy of report in question to defendants with copy of said proceedings. The report was in the hands of creditors at said meeting, 25th February, 1860, and at their disposal. Identifies letter of 28th February, 1860, as that sent by witness and partner to defendants on receipt of their letter of 27th February 1860.

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32 Little St. James Street,
MONTREAL, 28th February, 1860.

MESSRS. LESLIE & Co.

Gentlemen,—Your letter of the 27th instant has been received, and in reply I am instructed to say that the report of the Accountants is still incomplete, owing to the want of further information, and it is satisfactory to find that you are willing to furnish any information required. The creditors will therefore feel obliged if you will let them have your bank books, check books, blotters, accounts sales, accounts current, retired notes and checks, with any other papers that may be found necessary during the course of the audit. On receipt of these auxiliaries, the audit of the books will be completed without delay, and the books can then be returned. It will be necessary to make certain entries in them, to which we presume you have no objections.

I am farther directed to state that the creditors are disappointed at receiving no answer to their 3rd resolution, dated 25th instant, requiring you to make an unconditional assignment to the parties selected by them, of the entire property of the firm, as well as that of the individual partners. I have accordingly again to request an answer on this point, or your non-compliance with in 48 hours will

be considered by the creditors as an absolute refusal to accede to their demand.

Waiting your reply,

I remain,

Gentlemen,

Your respectfully,

(Signed,) THOMAS R. JOHNSON,

Secretary.

The Report of Messrs. Greenshields and Johnson, which you wish to see, lays at their office, where you can inspect it. It cannot however be completed until the books are written up.

(Signed,) T. R. J.

Identifies copy of letter of 29th February, 1860, as copy of letter sent by Defendants to witness in answer to his letter of 28th February, 1860.

MONTREAL, 29th February, 1860.

Sir,—In reply to that portion of your letter of yesterday's date, referring to a resolution of our creditors on the subject of an assignment, we beg to refer you to our letter of the 25th inst., enclosing to you a copy of a provisional assignment made by us on the 24th instant, and also, to the terms of that deed. It appears to us that there could not be a reasonable objection to the course indicated by that deed being followed, namely that our books should be written up and balanced, and an opportunity afforded us of making a specific offer to our creditors. It is quite obvious that until our friends are made aware of the exact state of our affairs, we cannot expect them to aid us with their names; and they can only acquire that knowledge from our books and accounts, the completion of which to date, we are prepared to undertake at once under the direction of our provisional assignees.

If we cannot obtain the support of our friends in making such an offer of compromise, as will satisfy the creditors, the whole of our estate is to be given up to assignees of their nomination, subject to no condition but that of our discharge, a condition without which we believe an assignment is almost if not quite unprecedented. Though we cannot think these conditions unreasonable, we are perfectly willing that our provisional assignees should at once make over our estate to the persons named by our creditors on our creditors accept-

ing the assignment and discharging us, as our provisional assignment enables them to do after our offer of compromise is declined: though we must say that we think the mode of settling the estate by a composition, when interests are so complicated and conflicting, much the most advantageous for all parties.

With regard to the request you make for our supplementary books and vouchers we must say that we hold them only as agents for our provisional assignees or for any assignees that may be constituted recipients of our estate under the nomination of our creditors. We do not think that they or we ought in reason to be called upon to hand over our books to any one for completion: and we decidedly object to any person whomsoever making entries in them except with our express consent, which we have not yet given to any but our provisional assignees.

We beg also to call the attention of our creditors to an advertisement published by our provisional assignees in the daily papers, for the purposes of which we have, *pro tempore*, authority to act as their agents, and our instructions are to deposit to their credit in their capacity as such assignees, all monies arising from collections or otherwise from our assets to await the action of our creditors.

Your obedient servants,

(Signed,) LESLIE & Co.

THOMAS R. JOHNSON, ESQ.,
&c., &c.

Has some recollection of Mr. Abbott, Advocate for the Defendants, Leslie &Co, coming to witness' office with two or three of committee of creditors of Defendants. He went there with Mr. Workman; does not remember whether it was at a formal meeting or not of creditors of Defendants. There was a discussion at that time about the terms of the provisional assignment. He recollects that on the occasion in question, Mr. Abbott offered to put a clause in the assignment, by which the discharge thereby given to Defendants, by the creditors, would be null and void, in case they discovered any fraud or malpractice in the conduct of the Defendants. The members, creditors' assignees were named at meeting of 25th February, 1860. The creditors' assignees, exclusive of Mr. Leslie, one of the assignees, were present at meeting in question, when Mr. Abbott was present. This interview was after the 25th February, 1860. This was an informal meeting, as there were no minutes of it. If there were any minutes of the meetings of the committee, they were very few. The purport of Mr. Abbott's interview was that the discharge

of creditors should be null if any fraud were discovered on the part of the Defendants. Identifies copy of letter dated 29th February, 1860, as copy of letter sent by Defendants to witness and partner. This letter was communicated to creditors.

MONTREAL, 29th Feby., 1860.

Gentlemen,—We refer you to our letter of this day's date to your Mr. Johnson, for information as to our intentions with regard to our books already in your possession, and the supplementary books and documents which Mr. Johnson has required from us. We trust that you will not consider it reasonable longer to retain our books: and that you will be good enough to return them to us forthwith. At the same time we beg to reiterate the assurance which we are authorized to make by our provisional assignees, that during their continuance in that capacity, which we presume will be but temporary, free access to our books and the fullest information will always be given to any one representing our creditors.

Your obedient servants,

(Signed,) LESLIE & Co.

Messrs. Greenshields & Johnson.

Books were not given up on receipt of this letter—considered he could not deliver books without order from creditors—Retained books until *saisie revendication* was served upon witness and partner to revendicate books—Had some hints given him about the service of this writ of *saisie revendication*—It was not a notice by Defendant's Counsel—was from private source—Does not remember whether books were removed from office at time of service of said writ—was absent at time—Some time after the service of said writ witness gave up books to Defendants upon order of creditors—when books were delivered they were delivered from office of Mr. Laflamme—the officer charged with execution of said writ could not find books in witness' office—Mr. Greenshields told him he could not identify books, there were so many in the office—The said books were marked with initials "L & Co," of defendants on back—Identifies books now in Court that were in his possession—There was a meeting of creditors at office of witness and partner on the 3rd March, 1860—Plaintiff was present at that meeting—The correspondence which had taken place between Defendants and their creditors was read before the said meeting—Correspondence, defendants Exhibit B, was correspondence which was read at said meeting, that is a part of it—The letters contained in said Exhibit were read at said meeting, but the reports were not.

(The only portion of the correspondence in Exhibit B, which has not already been given, is as follows :)

MONTREAL, *25th February*, 1860.

SIRS,—As several of our creditors were proceeding against us at law, and some anxiety was felt as to their obtaining preferences by priority of enregistration, we have concluded that it would be for the interest of the creditors as well as ourselves to place our estate in a position to prevent the possibility of such preferences, and also to render unnecessary and to prevent further legal expenses. We believe we have effected this by a provisional assignment executed yesterday, to the Hon. James Leslie, Alexander M. Delisle, Esq., and Henry Starnes, Esq., which assignment is of the following purport:—

1. It provides for an investigation of our books and estate, under the supervision of the assignees, and for a report by them to the creditors, as soon as our secondary liabilities mature.

2. If we can then effect a satisfactory settlement by a composition with our creditors, the estate is to be returned to us.

3. If we cannot, the estate is to be wound up by the assignees now appointed, or by any other assignees, whom the creditors may select, we receiving our discharge.

Your obedient servants,

(Signed,) LESLIE & CO.

Messrs. GREENSHIELDS & JOHNSON,
Accountants, &c., for Creditors.

QUEBEC, *7th March*, 1860.

DEAR SIR,—I am much obliged by the trouble you have taken in writing me on the subject of my son's estate, and very willingly seize the opportunity of offering a few remarks upon the position of affairs, as I understand it.

It appears to me that the complaints of the creditors turn chiefly upon two points. First, that the books do not exhibit correctly the state of Leslie & Co's affairs, and that they refuse explanations and documents; and second, that they have made a provisional assignment to Messrs. Delisle and Starnes, who are not creditors of the estate.

Taking these in their order, I would remark to you that the firm's books not having been written up at the time of the first meeting of creditors, they only professed to submit an approximate statement. That ever since, their books have been withheld from them, and

that until they are finally posted up and balanced, it is impossible to give the creditors the requisite statement of their affairs.

I am informed that they have offered and still offer to have them posted up by a competent accountant, at the earliest possible moment, and then to submit full detailed statements to their creditors.

As to the provisional assignment, I beg to say that I also am a party to it; that the Ontario Bank, represented by Mr. Starnes and myself, are two of the largest creditors of the estate; and that Mrs. Patrick Leslie's claim for dower is also a very large one. So that the provisional assignees represent the creditors to a much greater extent than the assignees named by the creditors themselves. Apart from this, however, if the creditors take the trouble to read the assignment and a letter addressed to them last week by Leslie & Co., they will find that it is in their power at once to obtain the assignment of the whole to assignees of their own nomination, subject only to the granting a discharge to the firm, which discharge the firm are advised, would be invalid if there were found to be any fraudulent concealment.

It is impossible that any creditor can consider an offer of an immediate and complete surrender of the whole estate with the sole condition of a discharge, either "an outrage to his feelings," or "an intolerable injustice;" nor can creditors reasonably object to an assignment made only to protect the estate from preferential claims until the firm could make an offer, which assignment is terminable at their own pleasure.

If the creditors really mean to demand the estate, without granting a discharge, or to ask the firm to surrender unconditionally all their books, papers and vouchers, and place themselves completely at their mercy, I must say that I could not recommend any merchant to comply with such a demand, nor am I aware that such a demand has ever been made in a similar case. The creditors have now the option of allowing the books to be written up, and of accepting or refusing a composition when the position of the estate is understood, which I think is the most advantageous mode; or they may at once take the estate itself, on granting a discharge. If they consider this offer of a choice of proceeding unreasonable, I must say that I differ with them entirely; and if they plunge the estate into litigation, the loss will be serious, both for them and me.

As to the Wolfe Island property, I have only to say that I understood an attempt was likely to be made to obtain preference by suing in Upper Canada, and that I caused an estimate to be made

of the value of my son's right in it. I then took a deed of transfer of his interest at the price fixed in that estimate; which I believe to have been a fair one, and that price now forms part of the assets of his estate. I cannot perceive how this injures his estate, but the reverse; especially as I might have appropriated the whole on account of my claim, as any creditor might have done who obtained a judgment in Upper Canada.

Your obedient servant,

JAMES LESLIE.

JOHN REDPATH, Esq.

At the interview between Mr. Abbott and the Committee, the propriety of having the books written up was discussed. The Committee suggested that Messrs. Greenshields & Johnson should do so in conjunction with some other party. Mr. Abbott said that Defendants would probably have objection to witness and partner, as they had already expressed an opinion, that is given in their report. Has no recollection that Mr. Abbott proposed that other accountants should be chosen, leaving witness and partner out. At said interview, creditors had no objection to a joint accountant with witness and partner. Has no recollection that this was the principal difficulty at said interview between Mr. Abbott and creditors. Reads minutes of meeting of creditors of the 3rd March, 1860. Identifies third resolution entered on minutes of that meeting.

At a meeting of creditors of Messrs. Leslie & Co., held at the office of Messrs. Greenshields & Johnson, No. 32 Little St. James Street, Montreal, on Saturday 3rd March, 1860, at 1 p.m., were present:

Messrs. Thomas Ryan, E. Maitland, W. Workman, W. Sache (Cashier Molsons Bank), J. Redpath, John Ostell, Mr. Hooper (representing Bank of B. N. A.), Mr. King (representing Bank of Montreal), Mr. Scott (representing H. Routh & Co.), James Gordon, D. Torrance, D. Masson, James Torrance, Henry Chapman, Joseph Tiffin, G. Moffatt, Junr., D. Mitchell (Pigeon, Sauvageau & Co.), Mr. Chaplin (representing Mills, Mattice & Co.).

On motion, J. Redpath, Esq., took the chair.

The meeting being called to order, the Secretary was requested to read the minutes of last meeting, which was done accordingly and the minutes adopted.

The correspondence that took place between Messrs. Leslie & Co. and the committee of creditors was read and laid before the meeting.

The Chairman then explained the position of affairs as they now exist.

It was moved by D. Torrance, Esq., seconded by G. Moffatt, Jr., Esq., and resolved:

"That the Committee, Messrs. W. Workman, E. Maitland and Thomas Ryan, are authorized to consult with Mr. Laflamme and any other counsel, and to be guided by them as to whether it will be safe and for the interest of the creditors to accept an assignment with the condition that a certain period shall be allowed Messrs. Leslie & Co. to write up their books, they employing one accountant and the creditors another for that purpose, with a view to enable Leslie & Co. to offer a composition; and in case such composition is not satisfactory to creditors, then the assignment to be of no avail, but to be exigible if the composition be not accepted. The Committee and Mr. Laflamme to insert in deed of assignment such other conditions as may be required for the safety of the creditors, and to submit the same to creditors as early as possible." Carried.

Meeting then adjourned.

(Signed,) THOMAS R. JOHNSON,
Secretary.

Identifies first resolution contained in minutes of meeting of 8th March, 1860. It was at this meeting that the resolution read yesterday to Jury promising discharge to defendants was passed, and contained in notification of 9th March, 1860. The Banque du Peuple, the Hon. James Leslie, both creditors, were not present at said meeting. There were over 20 creditors at said meeting. All were notified to be there; Plaintiff was not present at said meeting of 8th March, 1860.

At a meeting of creditors of Messrs. Leslie & Co., held at office of Greenshields & Johnson, 32 Little St. James Street, Montreal, on Thursday the 8th March, inst., at 3 P. M., were present:

Messrs. Thomas Ryan, E. Maitland, J. Redpath, Joseph Tiffin, D. Masson, Pigeon, Savaugeau & Co., James Torrance, G. Moffatt, jr., W. Sache, Mr. King, R. Cassels, W. Workman, Mr. Chaplin, (for Mills, Mattice & Co.,) Mr. Mathews, (for I. Buchanan, Harris & Co.,) John Ostell, Mr. Scott (for H. Routh & Co,), Mr. Cramp, James Gordon, James Noad, and H. Starnes.

On motion, J. Redpath, Esq., took the chair. The meeting being called to order, Mr. Johnson was requested to read the minutes of last meeting, which was done and the minutes adopted

Thos. Ryan, Esq., read the opinion of the counsel obtained for the creditors ; after some discussion on the subject, it was moved by D. Masson, Esq., seconded by John Ostell, Esq., and resolved,—

That the Messrs. Leslie & Co. be regularly notified to make an immediate unconditional assignment to creditors in the hands of Messrs. W. Workman, Edward Maitland, Thos. Ryan, and the Honourable James Leslie.

Which being put to the meeting passed, 15 for, 3 against, (R. Cassels, Jas. Gordon, and Mr. Sauvageau only dissenting ; Mr. Noad and Mr. Workman not voting.)

It was moved by Mr. Scott, seconded by Mr. Ryan, and resolved,—

That upon the above assignment being made, all reasonable time and every facility will be granted by the creditors to Messrs. Leslie & Co. for bringing up their books and elucidating their statements by approved accountants, one to be named by Messrs. Leslie & Co., another by the creditors, and that upon every asset, and reversionary interest or otherwise being surrendered and all deficiencies satisfactorily explained, a discharge will be granted them.

Which being put to the meeting, passed.

It was moved by James Torrance, Esq., seconded by Joseph Tiffin, Esq., and resolved,

That Messrs. Workman, Maitland and Ryan be authorized to carry out the foregoing resolutions.—Passed.

The meeting then adjourned.

(Signed,) THOMAS R. JOHNSON,
Secretary.

The next meeting was on the 13th March, 1860 ; Plaintiff was present. The first proceeding of meeting of 13th March, 1860, was that the proceedings of last preceding meeting were read and adopted. Thirteen creditors were present at meeting of 13th March, 1860. Identifies resolution of meeting of 13th March, 1860, by which the three Banks, namely Bank of Montreal, Bank of British North America, and Molsons Bank, were requested to attach goods of defendants.

At a special meeting of creditors of Messrs. Leslie & Co., held at the office of Greenshields & Johnson, 32 Little St. James Street, Montreal, on Tuesday, 13th March, 1860, at 3 P.M.

Were present, Messrs. W. Molson, E. Maitland, Thos. Ryan, Marsais, King, , James Torrance, Hooper, John Red-

path, D. Masson, James Gordon, Mr. Laflamme (by request) D. Torrance, Joseph Tiffin, (represented by Cooper), Mr. Mathews.

On motion Mr. Redpath took the chair.

The meeting being organized, Mr. Johnson was requested to read the minutes, which was done, and adopted.—Mr. Johnson was requested to read the notice served on Messrs. Leslie & Co., with reference to the assignment.

It was then resolved and carried unanimously,

That the Banks represented at this meeting, viz., the Molsons Bank, the Bank of British North America, and the Bank of Montreal be requested to undertake the duty of attaching the property of the debtors and take such other steps as may be necessary, and that this meeting do adjourn until three o'clock to-morrow to receive the decision of the Banks.

And at a meeting of 14th March, 1860, said resolution was approved of. Identifies agreement dated 13th March, 1860, by which creditors agreed to pay, *pro rata*, the expenses of said attachment, and submitted and approved of at meeting of 14th March, 1860. The signatures to said agreement were obtained by witness and partner, and greater part were procured at witness's office.

MONTREAL, March 14th, 1860.

At the adjourned special meeting at 3 o'clock this day:

Mr. Redpath in the chair: were present;—

Routh & Co. per John Ashell, J. Redpath, D. Torrance, Edward Maitland, James Torrance, Thomas Ryan, E. H. King, for Bank of Montreal, Alfred Masson, for D. Masson & Co., Angus C. Hooper, for Bank of British North America, Haviland Routh & Co., per W. Scott.

The resolution of yesterday, having been read, Mr. Hooper and Mr. King stated that the Banks had decided to the resolution of the creditors, and would each attach for the benefit of all the creditors, and had instructed Mr. Laflamme to procced, who would be prepared, and would attach to morrow.

Mr. Redpath, the Chairman, then directed the accountants, Messrs. Greenshields & Johnson to wait upon and write to all the creditors, requesting them to sign the document, binding themselves to share all the expenses incurred rateably, for the benefit of all the Creditors.

After some desultory conversation, the meeting adjourned at 4¼ P. M.

Extracts from proceedings of meeting of Leslie & Co's creditors, held at Montreal at the office of Greenshields & Johnson, Accountants, on the 14th March, 1860.

"Mr. Redpath, Chairman, then directed the accountants, Messrs. Greenshields & Johnson, to wait upon all the creditors, requesting them to sign the document binding themselves to share all expenses incurred, for the general benefit, pro rata."

COPY OF DOCUMENT REFERRED TO IN ABOVE.

We, the undersigned creditors of the bankrupt firm, Leslie & Co., hereby agree and bind ourselves to pay a proportion of all costs of any description, whatsoever, and of

all damages which may arise out of the prosecution of any legal proceedings which may be taken in the name, or at the suit of any of the Creditors, against the said firm or the respective members thereof, provided the same be authorized by the Bank of Montreal, the Bank of British North America, and the Molsons Bank, appointed by the undersigned, as a committee to take such steps as they may deem most advisable for the benefit of the creditors, and we therefore bind ourselves to pay each our respective share in all costs and damages arising from, or connected with any such proceedings according to the amount of our respective claims *pro rata*.

I. Buchanan, Harris & Co.
Gillespie, Moffatt & Co.
J. & J. Mitchell,
Jno. Ostell,
J. Redpath & Son.,
Angus C. Hooper, Manager, B.B.N.A.
Havilland Routh & Co.
D. Torrance & Co.
W. Molson, President, Molsons Bank,
Ewd. Maitland, Tylee & Co.
James Torrance & Co.
Ryan, Brothers & Co.
E. H. King, Manager, Bank of Montreal,
D. Masson & Co.

Montreal, 13th March, 1860.

There was a meeting of 5th April, 1860, at which Plaintiff was present. Identifies minutes of said meeting, 5th April, 1860.

At a special meeting of the Creditors of Leslie & Co., held on the 5th April, 1860, at the office of Greenshields & Johnson:

The Creditors present proposed that Mr. Hooper be requested to take out an action for damages against E. S. Leslie and Patrick Leslie, to which he assented.

Mr. Laflamme was requested to take all the necessary steps to bring the matter to an immediate issue as soon as possible, and for the more effectually furthering the object to associate Henry Stuart and F. G. Johnson in the prosecution of the case.

Employed Mr. John Bethune, accountant, besides office assistance, to audit Defendants' books. Heard that Mr. Bethune had been employed by Defendants to make report, on state of their affairs. Is aware that Mr. Bethune made report marked Z, and produced with Defendants' answers to Interrogatories, and also read yesterday to Jury.

Re-examined.—The date of the interview between Mr. Abbott and Committee, as above stated, was subsequent to the 25th February, 1860, as far as witness' memory serves him. Is not positive whether it was before 9th March, 1860, but thinks it was before 8th March, 1860.

Questioned by Jury.—The Cash-book of Defendants had not been added up; even the first page was not added up. Witness or partner did not add it up.—There were a good number of pencil-marks in said book; did not pay attention to them, because they were not correct. The Cash-book commenced by date January, 1859; the page of Cash-book referred to is dated January, 1859.

Hon. James Leslie.—Is father of Defendants. Is person named in provisional deed of assignment. Made purchase of property from his son, Edward S. Leslie, on the 6th February, 1860, which was confirmed in writing by deed on the 11th February, 1860. Said property is situated in Wolfe and Howe Islands, County of Frontenac in Upper Canada. This was reversionary property, which he, witness, held by the courtesy of the law.

Question.—Take communication of the document now shewn to you, purporting to be a memorial to be registered pursuant to the statute in such case made and provided, of an indenture of bargain and sale made on the 11th day of February, 1860, between Edward Stuart Leslie and you; and state whether that document was not drawn and executed at your request; and was it not duly registered?

Answer.—Witness should think this document was not drawn at his request, because the memorial purports to be signed by E. S. Leslie, and this document may be a copy. He does not know.

There was a memorial drawn for the purpose of registration of the deed he has mentioned.

Question.—Have you read the document in question?—No.

Question.—Read the document in question, and state to the best of your knowledge, whether the one which is now exhibited to you, is an exact copy of the memorial of the purchase you made for the purpose of registration in Upper Canada.

Defendants object to the production of the document in question being copy of a memorial, and being insufficient and illegal testimony.

Objection maintained.

Identifies signature James Durand, affixed to the document now shewn to witness, the same document as above stated, to be signature of James Durand, the registrar for the County of Frontenac, the said paper marked Y fyled this day. Can't say whether the said document is an exact copy of the memorial. Can't swear to the identity of the lots mentioned in said document Y as being those bought by witness, except four or five of them, and believes their admeasurement not to be correct as far as Wolfe Island is concerned. Has enjoyment of said property and has had it since 1823, that is the Letters Patent were granted then, but he does not know whether he had the right of proprietor in said property since wife's death or before. The property in question is derived from the late Mrs. Leslie. The copy of the last will and testament of Mrs. Leslie, marked XX and fyled at this trial, is not the title under which witness and son hold the property in question. She held the said property by Letters Patent from the Crown, and

the said will is the only will she made. When the said Mrs. Leslie made the said will, women could not dispose of property in Upper Canada, by last will and testament, according to the law of Upper Canada. Witness and son hold said property by law of Upper Canada, and not by will aforesaid of Mrs. Leslie. The said copy is here produced and read; witness can't say whether the lots mentioned in said document Y are the same as those which he purchased from his son, except a few of them which he identifies, but he purchased from his son his reversionary rights to all the lots in Wolfe and Howe Islands aforesaid, which his Son had inherited from his mother, and which at time of purchase were unsold. Paid for lots bought from his son £3000 in three notes of £1000 each, payable each note one year from its date, with interest thereon. Witness is aged seventy-five years. Is not certain whether Mr. Delisle, was a creditor of Defendants at time of their insolvency, except that he represented his daughter.

Cross examined.—Paper X of Defendants, being shown to witness, he says that he recollects only a few of the lots therein mentioned, but has no doubt that it contains a correct statement of the lots he purchased from son on 11th February, 1860, and he also recollects the names of several of the occupants of same therein mentioned. These lands were all leased from 21 to 99 years. The gross rental derived from these lands is between £300 and £350 per annum. He thinks average revenue received by him is £313 per annum. Made a statement of said revenue some time ago, making it £313. Wrote to a person well qualified, at Kingston, to ascertain value of said lands when about to buy them from son. Said person was agent for said lands during several years. The name of the person is Mr. Kirkpatrick, Q.C., at Kingston. He valued said property at £3000, the amount witness paid for it. Has seen these lands once or twice. From what he knows of said lands, he considered his son's interest in said lands was not worth more than £3000. Witness was informed by legal advice in Upper Canada that he might appropriate the whole sum he paid for his son's interest in said lands, on account of his own debt, according to the laws of Upper Canada. Defendants owed witness at time of said purchase about $28,000 or $30,000. If Defendant Edward Stuart Leslie wished to defraud his creditors, he might, according to the laws of Upper Canada, have paid over to witness that sum of £3000 on account of his debt, which would have been a legal payment according to law of Upper Canada: instead of that, the amount forms part of the assets for the creditors. These lands are the lands referred to in general terms in

the will of Mrs. Leslie as having been bequeathed to her children in equal portions. She had four children, so that Edward S. Leslie would have had but one fourth of said lands, and that only after the decease of the witness. Witness was one of the assignees named in deed of provisional assignment. Up to time of execution of said deed, witness knew what defendants were doing to wind up their estate. After the execution of said deed, he was absent in Quebec. Witness had no intention to conceal anything from the creditors, when he accepted the nomination of himself as one of the assignees of provisional assignment. Would not have accepted said office if assignment had concealment for object, or permitted any concealing. Knows no concealment or secretion on part of Defendants of their estate or books at any time. The object of such provisional assignment was to keep estate together for benefit of creditors. The provisional assignees were prepared at any moment to assign the whole estate to assignees named by creditors on condition of their giving Defendants a discharge. Witness sanctioned proposition of Mr. Abbott made at interview of Committee as aforesaid, that a clause should be put in the assignment to be made to the effect that the discharge would be null if any fraud or mal-practice were discovered on the part of the Defendants.

Re-examined.—Has sold some of lots purchased from son from 8 to 10 dollars per acre to occupants, who had made considerable improvements in those lots.

The revenue of said property last year was £350. In that sum were comprehended the arrears of several years, and price of lots sold. All lots purchased by witness are under lease he believes—he does not know the actual state of these lots as he has not been there for 20 years—The gross rental is from £350 to £370 per annum—Applied to no one but Mr. Kirkpatrick to ascertain value of said lands, —Witness bought son's reversionary rights in said property—understands that according to laws of Upper Canada his son would become absolute proprietor of said lands after the decease of witness—Was advised had a life estate in said lands by law of Upper Canada—By Mrs. Leslie's will the said property was to be divided among children generally—declares has no doubt that his son and self were the only persons who had any interest whatever in the land purchased, according to law of Upper Canada.

By Jury.—The reasons that witness bought said property were that several creditors in Upper Canada were endeavoring to obtain judgments against the Defendants, and that he was informed that the person first seizing lands had a privilege over all other persons in

seized lands, according to law of Upper Canada; and that he thought it better that the £3000 should be applied for the benefit of the creditors in general, instead of individual creditors, who might have seized the lands and applied the proceeds of sale to meet their own particular debts. Was not aware at time of said purchase that it was requisite for a debtor of Lower Canada to go to Upper Canada in order that he might be served with a summons there, previous to obtaining a judgment against said debtor by any creditor. He knows that now, subsequent to the question having been decided upon summonses in Upper Canada, issued against the Defendants and served here; took care to have them, Defendants, to go to Upper Canada to obtain judgment against them; but subsequent to creditors having sued Defendants. Did not know at time he sued that other creditors could not obtain judgment without summoning in Upper Canada. When witness made said purchase it was for the protection of son's estate. Believes that some proposition was made indirectly to him this year, 1861, on part of the creditors, to the effect that they would give back to witness his three notes given as purchase money as aforesaid, on condition that witness would give up said property purchased from his son as aforesaid. Witness refused to do so. Witness said would give up said property provided that said creditors would give up all rights to seigniorial property of Defendants in Lower Canada, without admitting that creditors had right to same. Witness made no valuation of son's right of property in the seigniory. He considered creditors had no right to it; property was entailed. Is not aware that seigniory was estimated over $15,000. He does not know at what they were estimated. Does not know whether they were worth over $15,000. Has usufruct of seigniory. The *lods et ventes* on properties of seigniory in question, were about £49 per six months. Does not know what seigniory gives by *lods et ventes*. The wheat has been valued at 5s 6d per minot on said property, and the *corvées* at 2s 6d per day.

Robert M. Kay.—Is a practising advocate at Montreal, and has been so for upwards of twenty years. Was consulted about provisional assignment by creditors, and gave a written opinion thereupon, which he now produces, marked A.

CASE.—A.

Messrs. Edward Stuart Leslie and Patrick Leslie, Bankrupts, have made the Provisional Assignment executed by Deed of 23d February, 1860, before Griffin and his colleague, Notaries, with the conditions therein mentioned, without previous notice to their Creditors and without any assent or concurrence on the part of their Creditors named in the Deed.

The parties selected by the Debtors as assignees on this provisional assignment are three in number; the first is the father of the two bankrupts, the second the father-in-law of one of them, and the third, together with Mr. Leslie, senior, the father, was a member of the firm heretofore existing between them and the bankrupts, under the name of Leslie, Starnes and Company.

The Creditors have reason to believe, or at least to suspect, that there may exist claims of the bankrupt estate against these ex-members of the old firm appointed as assignees by the bankrupts. In addition to this, the Creditors have been informed that the bankrupts have since their open insolvency disposed, in favour of their father, of some of their property of great value.

The Questions submitted to Counsel upon this provisional assignment are the following:—

1st. Is this provisional assignment valid in law, and are the Creditors bound to notice the same?

2nd. What kind of assignment are the Creditors entitled by law to have from their bankrupt debtor?

3rd. What are the remedies the law allows to the Creditors under the circumstances disclosed by the above-mentioned provisional assignment and those connected therewith?

4th. If any such sale as this one reported to the Creditors was made by the Debtors when declared insolvent, what is its legal effect and the consequences in favour of the Creditors?

Upon the First Question:

After careful examination of the deed of assignment submitted, I have no hesitation in declaring it an absolute nullity; it can have no legal effect whatever against the Creditors, who cannot be bound to take any notice thereof.

The proper course for the Creditors in this instance is to obtain from the Debtors an assignment (to which these provisional assignees would be a party) in order to obtain a delivery of all property of the estate. The Creditors may give the Debtors a discharge if they think fit, on condition that the whole of their assets have been delivered, that there has been no concealment of any portion or no fraud committed to the detriment of the Creditors. In a word, the Creditors having a right to obtain an unconditional assignment, they can insist on any condition they please; as it contains conditions contrary to the first principles in the law of Creditor and Debtor, an assignment cannot by law be discretionary on the part of the Debtor, but it is optional with the Creditors to demand it. It is by them and for their benefit only that an assignment can be demanded and consequently it is on them that the selection of assignees devolves. The Debtor cannot dictate or exact by such an *ex parte* assignment the conditions of his discharge from his creditors, nor can he give to assignees of his own choice the right to settle claims of a doubtful nature, such as the contingent claims mentioned in the assignment, which relate only to the marriage settlement of Mr. Patrick Leslie.

On the Second Question:

The Creditors are entitled to have from their bankrupt Debtors a full and unconditional assignment, to which their provisional assignees would be a party, in order to have from them the delivery of whatever property of the estate they may have in their possession. The Creditors may give the Debtors a discharge, if they think fit, on condition that the whole of their assets have been delivered, that there has been no concealment of any portion, or no fraud committed, to the detriment of the Creditors. In a word, the Creditors having a right to obtain an unconditional assignment, they can insert any condition they please.

On the Third Question:

The law gives the creditor the right to obtain a complete and unconditional assignment from his bankrupt debtor, in case of refusal to accede to this demand; any cir-

cumstance disclosing fraud, if he should not continue his business, would give to the creditor the right to attach the property, debts and effects, and would also enable the creditor to proceed to attach his body.

Thus, under the circumstances disclosed by this provisional assignment, if the Messrs. Leslie refuse to make an unconditional assignment to the person selected by their creditors, and persist in maintaining the assignment, as it is with its present conditions, the creditors would be entitled to proceed by attachment against the goods and persons of the debtors, as the whole facts in the present case are sufficient to make out what the law considers a just foundation for the creditors' belief that the debtors are about to secrete their estate, debts and effects.

If any sale has been made by the bankrupt debtors to their father since their declared insolvency, it is absolutely null and void, and sufficient without any other reason to justify the exercise of active measures on the part of their creditors, such as attachment and capias.

Montreal, 6th March, 1860.

R. LAFLAMME.

The undersigned, advocate, having read the above foregoing case and the deed of assignment, passed before Griffin, N. P., referred to, and deliberated, is of opinion that the conditional assignment referred to is fraudulent, null and void, and generally concurs in the above opinion of Mr. Laflamme.

Montreal, March 6, 1860.

ROBERT MACKAY, *Advocate.*

Witness considered provisional assignment as suspicious, it being made to relatives.

Cross-examined.—Was not informed at time he gave said opinion that the creditors who were about to take the writs of attachment against Defendants, had already judgments against them.—Recognises that two judgments produced at trial, and fyled under letters Bb. Cc., by Defendants, were rendered on day mentioned therein, 27th February, 1860.* He also recognizes six other judgments, here produced, and fyled under letters, Dd, Ee, Ff, Gg, Kk, Ll, by Defendants, as having been rendered on the days therein mentioned in March, 1860. He also recognizes three inscriptions upon the *role de droit*, as having been executed respectively on the days therein mentioned, and which are now produced, and fyled by Defendants, under numbers 1, 2, 3; probably would not have advised course of attachment before judgment, had he known of the judgments then already against Defendants.

WILLIAM MILLER RAMSAY.—Is acting manager of Colonial Life Insurance Company; the value of a man's life at 75 years of age, is £269 18s. 10d. per £1000 of property, that is diminishes value of property to £269 18s. 10d.

Cross-examined.—The calculation is made at 6 per cent. and from the experience of a great number of lives. This calculation enables Insurance Companies to make their profits. If a man were aged 73

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* These were judgments for about $9000 and costs. Rep.

years, his interest for £1000 would be £297 14s. 8d, cy.; knows nothing about condition or state of the Hon. James Leslie.

By the Jury.—The present value of £1000 payable at death of a man, aged 73, would be £706.

DONALD LORN MACDOUGALL.—Is doing business at Montreal, as broker, knows Plaintiff is acting manager of Bank of British North America.

Question.—Can you form an estimate of the damage in money, if it can be so estimated, to a man in the Plaintiff's situation, by a public accusation for perjury?

[Question objected to and maintained: otherwise, witness would assess damages, not the jury.]

Plaintiff's position as acting manager, is one of most confidential nature. An accusation brought against a person for perjury, would prevent witness from employing him. At time of accusation of perjury made against Plaintiff, was spoken of and known among merchants and others. If a person is accused of perjury it is very outrageous to a man's feelings.

Cross-examined.—The fact of indictment for perjury having been brought against Plaintiff has not injured him in my opinion, because I knew him well.—Would not have hesitated in employing Plaintiff after indictment because he knew him so well that it was not possible for it to be true. Cannot name any body in whose opinion Plaintiff was damaged by said indictment.

EDWARD THOMSON TAYLOR.—Counsel for Defendants agree to consider the evidence to be given by Mr. Taylor, same as that given by Mr. MacDougall.

THOMAS KIRBY.—Same entry as last preceding by consent of Counsel for Defendants.

JOHN H. BUSCH.—Is a farmer in Upper Canada, near Kingston, knows Howe and Wolfe Islands, in County of Frontenac, lives on last named. —About 2 or 3 miles from Howe Island to Wolfe Island. This latter is opposite to Kingston; knows something about value of property in those islands. Has lived on Howe Island for 40 years. A year ago last April, made estimation of value of property of Edward S. Leslie, on said islands. Witness holds in hands, and now produces and fyles a statement under letters Y Y Y which contains a correct description and mention of lots mentioned in the twenty-first interrogatory *sur faits et articles* submitted to Edward Stuart Leslie by Plaintiff, and the lots in Schedule marked X are also the same as those mentioned in said interrogatory; made a complete valuation of each of the said lots and the valuation so made by me is mentioned in said Y Y Y

The value of whole of said property is $39,633.—Thinks said property would sell for that amount; valued it according to leases of said property as much as possible.

Cross-examined.—Calculated said property at that amount payable in ten years with interest. People on lots on Howe Island are pretty poor. Some on Wolfe Island are pretty well off. Others are poor. Does not know whether these prices would certainly be paid in ten years: would not count much on prices being paid, but values said property at these prices; valued property lower on account of long leases. He valued the 99 years leases lower. He valued two lots at five dollars per acre. There is but one shilling rent per acre on these two lots. He valued first lot on said statement Y Y Y at $400. The reason he valued it at that sum is that the occupant of said lot would prefer paying $400 for it, to paying the rent $16 per year. Calculating this rent at 6 per cent. would give about $240. Leased for 88 years. Lot number 20, leased 68 years, valued at $666. In valuing this at that sum, he took into consideration that the rent would be raised to .50 per acre in fifty years.

In estimating lot No. 4 at sum mentioned in statement, he so estimated it because occupant would be willing to pay said sum in preference to paying rent. Fifth lot represents 3½ per cent. and leased for 6 or 7 years. Estimated at sum mentioned in statement because the lease thereof was short and other neighbouring lands were letting at same rate. Valued other lots at short leases on same principle. When witness valued land, valued at what it could be sold for, irrespective of Mr. Leslie's interest therein. Did not value lots according to rental. The land in Wolfe Island sells ordinarily at $10 per acre. Witness paid for one lot $4 per acre and for another $10 on Wolfe Island. He bought the former from Crown, the latter from Mr. Johnson's estate. The lot he bought for $4 is a first-class land. Bought it 14 years ago. Said statement YYY is in hand-writing of young man employed by witness. Witness made said statement.

Re-examined.—When witness made estimation of property leased in question, he took into consideration that he became absolute proprietor of such land if he bought it.

By Judge.—Could not say what property would bring in cash at sale by auction. It ought to fetch more than half, should bring two thirds of his estimation. It might bring at Sheriff's sale one half the estimation made. Those sales go very hard. Does not take into consideration in his estimation lands now seized and sold by Sheriff at half at Sheriff's sale. He did not include the interest of the Leslies.

STATEMENT OF LESLIE PROPERTY IN WOLFE AND HOWE ISLANDS, APRIL, 1869.

From Statement of Mr. Busch and Mr. Reiser.

STATEMENT OF LESLIE PROPERTY IN WOLFE AND HOWE ISLANDS, APRIL, 1869.

From Statement of Mr. Busch and Mr. Briggs, [illegible] and the Island Lands.

land and without any timber. A. B. 22. in a very bad state of cultivation and no buildings of account. A. B. 23. This is a broken piece of land and poorly improved. A. B. 24. This lot is very broken and in bad state of cultivation. A. B. 25, No. 9. Tenth, is in bad state of improvement and without any wood land fence, one Frame barn. A. B. 26. W½ No. 10, Belonging to Mr. Wm. Steel; is in good order and good land, Frame House. A. B. 27. This is a very broken lot and without any good improvement. A. B. This is fair land with frame Barn on middling well improved. A. B. 27. This is a very broken lot of land, half lime stone ledge. A. B. 30. Poor broken, land and in bad state of cultivation. A. B. 31. This is also poor broken land and in a bad state of cultivation. A. B. 32. This laud is of good quality and well improved. A. B. 33. Is also good and fairly improved. A. B. 34. Land good with fair improvemts. A. B. 35 is also good do. do. do.

N. B.—I have given my remarks in as plain a manner as in my power so as to give you as correct a statement of the lots of land as the circumstances will admit: and should you want any more information of me that I can give, I shall call at any time and see you.

(sd) A. BRIGGS.

STATEMENT OF LESLIE PROPERTY IN WOLFE AND HOWE ISLANDS, APRIL, 1860.

From Statement of Mr. Busch and Mr. Briggs.

Description.	No. of Acres.	Name of Lease holder.	Unexpired term of lease.	Rental.	Estimated value H. Busch.	Estimated value of lots. A. Briggs.	REMARKS. References to Foot Notes.
Wolfe Island							
16 Old Survey.....	80	John Crane.....	68	$16 00	400	2000	J H. B. 1—A. B. 1.
25 do	111	Mary Spoor.....	68	32.40	666	2000	A. B 2.
26 do	111	John Turcott.....	68	32.40	666	1000	J H. B. 2—A. B. 3.
4 in 2nd con.....	41	Martin Staly.....	62	8.20	205	410	J H. B. 3—A. B. 4.
1 in 3rd con.....	200	Wm. Grinshaw and others	6	80.00	2400	2000	A. B. 5.
E ½ of 2 in 8th con. ..	100	Arnold Sluman.....	69	30.00	600	1000	J H. B. 4—A. B. 6.
Part of 4 15 in 8th do	225	Joseph Kyle & Brown, W ½ ...	7	30.00 38.09	2700	1250	A. B. 7.
2 in 10th con.....	97	Henry Sluman & McDonald ...	9 x 7	14.10 15.10	970	970	A. B. 8.
1 " 11th "	200	Wm. Ryan & J. Gibson, ...	9	30.00 30.00	2000	2000	A. B. 9.
2 " 12th "	200	John Gray & John Harris.....	11	30.00 30.00	2000	2000	A. B. 10.
1 " 1st "	15	Simon Shaver	4	6.00	150	150	A. B. 11.
1 " 2nd "	112	Simon Shaver and others.....	4	44.80	1344	1120	A. B. 12.
2 " 2nd "	35	Joseph Yott.....	4	14.00	420	350	A. B. 13.
1 " 3rd "	200	George Grinshaw and others ..	5	80.00	2400	2000	A. B. 14.
2 " 3rd "	200	George Duggan and others....	5	80.00	2400	2000	A. B. 15.
1 " 4th "	200	Wm. Grinshaw and others	5	80.00	2400	2000	A. B. 16.
4 " 16th "	25	E. Farr & Holaday.....	No lease.	7.50	250	250	A. B. 17.
5 " 16th "	200	E. Farr & Holaday.....	No lease.	60.00	2400	2000	A. B. 18.
4 " 18th "	50	E. Farr.....	67	15.00	250	500	J H. B. 5—A. B. 19.
5 " 18th "	196	E. Farr & J. Goy	67	58.80	980	1960	J H. B. 6—A. B. 20.
617 " 19th "	48 & B.O.	Lyman, Chapman & Bready....	69	15.40 39.00	890	1150	H. B. 7—A. B. 21.
7 " 20th "	75	Sherman and others.....	6	30.00	450	375	A. B. 22.
8 " 20th "	200	James Rattery and others.....	7	80.00	1400	1400	A. B. 23.
9 " 20th "	200	Philip Helmore and others	14	60.00	1400	1400	A. B. 24.
10 " 20th "	30	Wm. Steel and others	14	9.00	210	210	A. B. 25.
8 " 21st "	100	Wm. McFaddin.....	No lease.	30.00	700	700	A. B. 26.
Howe Island.							
1 South of Road ..	71	Donald McDonald.....	No lease.	40.40	1080	1080	A. B. 27.
2 " ..	52						
3 " ..	64	M. Arno	8	19.20	256	256	A. B. 28.
4 " ..	96	Joseph Brushford	No lease.	28.80	576	576	A. B. 29.
5 " ..	140	Ambrose Pullido.....	No lease.	42.00	840	840	A. B. 30.
6 " ..	170	John Cox and others	8	51.00	1700	1700	A. B. 31.
7 " ..	181	Wm. Millby	10	54.30	1800	1810	A. B. 32.
8 " ..	184	Thomas Kame and others	8	55.20	1840	1840	A. B. 33.
W ½ 99 " ..	89	Thomas Kane.....	8	26.70	890	890	
					$39,633	$41,187	

J. H. B. 1. Rent permanent. J. H. B. 2. Rent raised after twenty-one years, every 7th year till 50 years. J. H. B. 3. Rent permanent. J. H. B. 4. After 21 years rent raised every 7th year till fifty years. J. H. B. 5. After 21 years rent raised every 7th year till fifty years. J. H. B. 6 do. do. J. H. B., 6 do. do. A. B. 1 No. 16, old survey, is a fine

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N. B.—I have given my remarks in as plain a manner as in my power so as to give you as correct a statement of the lots of land as the circumstances will admit: and should you want any more information of me that I can give, I shall call at any time and see you. (sd) A. BRIGGS.

ABSALOM BRIGGS.—Knows property in Howe and Wolfe Islands, a description of which has been read to preceding witness. Made valuation of said property. The statement made of such property produced and fyled by witness under letters zzz was made by him. He thinks about 2nd April, 1860, made valuation according to value of lots at that time. Valued them as he found them. Consideration were charges in said lots which undervalued them. Endeavoured to find original leases, and when found party had no chance of purchasing lots, he did not consider leases so valuable to occupants. Did not take into consideration leases of said lots when valued them. Valued them as free of all charges. Valued property according to improvements. Where improvements good and permanent, valued lots more. On said statement there are eight lots under leases having more than 14 years to run. The average value of land in general in said islands of description of lots in question he can't say exactly, but he has not seen lots change hands there since some years for less than $14 per acre. The total value of lots in question is estimated at $41,187 in said statement. Thinks property in question would realize that said amount if sold at present. Can't tell what discount there would be on cash sale, but believes that on a three years' about that said amount of $41,187 could be obtained.

Cross-examined.—Valued lands without consideration of Messrs Leslie's claim. Thinks first lot mentioned in said statement would bring amount therein mentioned if sold at present. It is leased for 68 years at $16 per year. Witness says that said property for Mr. Leslie would be worth only something over the capital of the rent. Valued all the lots in question, not according to Mr. Leslie's claims, but according to real value free of charges. It is impossible to tell value of rights of Mr. Leslie at present in said property subject to leases. The rights of Mr. Leslie in said property would be so much less in value, as he could enjoy them only after death of father. In his estimation of lands did not take into consideration any term of credit. Knows Mr. Kirkpatrick, Queen's Counsel. Latter has been agent of Messrs. Leslie for said property for long time. Thinks said Mr. Kirkpatrick is as competent a judge of value of rights of Mr. Leslie in said property as any person can be in his opinion.

ANDREW DRUMMOND.—Is Manager of Bank of Montreal at Kingston. Asked by creditors of Defendants about 14th March, 1860, to have estimation made of value of Defendant's property in Wolfe and Howe Islands. Obtained said information on the 15th March, 1860, and sent it to creditors same day. Has copy of letter conveying such information from letter-book. Addressed it to Mr. Redpath.

Cross-examined.—Defendants declare they have no questions to put to witness.

PATRICK LESLIE.—Is one of the Defendants. Witness and other Defendant kept books of firm, "Leslie & Co." Began new firm in 1858, in the month of April. Did not strike balance sheet of old firm. New firm may have purchased at one month's credit. Does not know. Having looked at first page of Bill-Book, he says commenced by 996. Can't say why bill-book nnmber 996. Bill-book not in his hand-writing. 996 was bill granted for business of new firm. Does not see bill number one. The date of said entry is dated April, 1858. Said bill 996 and bill 997 are entered in journal on 1st May, 1858. Bills were granted for purchases made by the new firm. Said journal contains all transactions of new firm. The purchases for which bills were granted are entered in journal. Bills 996 and 997 were granted for purchase of sugar, as appears by entry in journal. Three entries on page five of said journal for bills payable altogether for $4,350.88, are not entered in Bill-Book. Supposes there is no other entry connected with the payment of these bills, but that mentioned in the said journal. It does not appear in said journal for what object these three bills were granted. Entry of $10,246, page 34 of ledger, is entered in said journal, as being paid on account of bills payable. These bills were those of Leslie, Starnes & Co., and were not charged to them. They are not entered in said journal to Leslie, Starnes & Co., but are entered as our own bills.

About $36,000 in all were paid by our firm and charged to our Bills payable account, which were the bills of Leslie, Starnes & Co., and should have been charged to them, (Leslie, Starnes & Co.) At time of insolvency of Defendants there was no indication in their books to shew that these bills were paid on account of Leslie, Starnes & Co. To the best of witness' belief, the firm of Leslie, Starnes & Co., was perfectly solvent. There was no balance sheet struck when Mr. Starnes retired from firm.

Cross-examined.—When Defendants failed it was found impossible to balance their books until they were written up. Bills of Leslie, Starnes & Co., paid by Defendants were credited to cash, and charged to Bills payable in the Ledger. The account of Bills payable in our ledger, showed the discrepancy at once. The moment it would have been proceeded to balance the books, this error would have been discovered. By the ledger itself at the time of Defendants' insolvency, it appeared they had charged $36,000 or $38,000, of

Bills payable to that account which should not have been so. First became aware of this mistake after insolvency. The first knowledge they had of it, was derived from Mr. Johnson's report. Mr. Johnson found out mistake from Defendants' books. Thinks he could have had no difficulty in discovering this error. No attempt of any kind was made to conceal this fact. Mr. Bethune, accountant, was employed by provisional assignees to write up their books and balance them. Defendants gave Mr. Bethune every possible information to enable him to trace out these bills and to make proper entries regarding them. Mr. Starnes, also, had paid a considerable amount of debts due by Leslie, Starnes & Co. The shares of Defendants in old firm was $\frac{5}{8}$ and that of Mr. Starnes $\frac{3}{8}$. There were no other partners than Defendants and Mr. Starnes. Defendants were liable for $\frac{5}{8}$ of those $36,000, and were also liable to Mr. Starnes, for $\frac{5}{8}$ of what he paid. Believes that Mr. Starnes, did not owe Defendants one shilling at time of insolvency. Mr. Starnes is still liable for debts of old firm. Mr. Starnes is cashier of Ontario Bank. Said Bank was creditor of Defendants for a considerable sum.

CHARLES EDWARD SCHILLER.—Is deputy clerk of Crown. In March term of Criminal Court of 1860, at Montreal, Honorable Justice Mondelet presided. Is certain that no other Judge presided, and no other Criminal Court sat in March, 1860, at Montreal. Does not know Plaintiff personally.

Cross-examined.—There is a record of Court of Queen's Bench, wherein all proceedings on indictments are registered.

Re-examined by Plaintiff.—The register is made up from entries on back of bill of indictment.

Re-cross-examined.—The return of the bill of indictment is regisgistered the moment made to Court.

Re-examined by Plaintiff.—Enters return of bill of indictment in register from entry on back of indictment.

EDWARD STUART LESLIE.—Executed deed of sale to father, Hon. James Leslie, in February, 1860, of lands in Howe and Wolfe Islands. Signed at time of sale memorial for registration. Can't recollect whether paper marked Y fyled in this cause, is a copy of said memorial. Does not know signature of James Durand.

Cross-examined.—Sold only interest in said lands to father. Does not remember ever seeing lands in question. Ascertained value of said lands from agent, Mr. Thomas Kirkpatrick, Q. C., at Kingston. It was on report of Mr. Kirkpatrick, that price of said sale was fixed. Made sale in good faith, believing he was receiving full value for his rights therein.

JOHN REDPATH.—Is merchant of City of Montreal, and creditor of Defendants; at time of insolvency of Defendants in early part of March, 1860, wrote to friend Drummond, at Kingston, to ascertain value of land, belonging to Edward S. Leslie, on Howe and Wolfe Islands. Mr. Drummond wrote him that he Mr. Drummond, had ascertained value of land from Mr. Allan, at Kingston, who valued land at about $11,000, which witness communicated to creditors; witness wrote back to Mr. Drummond, to ascertain more particularly value of said land, whereupon he sent witness two statements, one valuing the land at about $10,000, and the other at $12,000.

Cross-examined.—Having looked at minute book fyled in this cause, witness says he is party to agreement copied in said minute book dated 13th March, 1860, for sole object of securing any expenses that might be incurred; was creditor of Defendants at time of insolvency to amount of $16,000.

Question.—Did you not become a party to said agreement for the purposes therein mentioned?—Witness did.

Received a quantity of his goods Defendants had on hand at time of insolvency which law allowed him to take back; the invoice price of goods witness got back, was about $9,500. He thinks these goods were sold about one month before witness had received said goods and a note of $1,500, to best of his recollection, making in all $11,000 on account of claim: remains due, about $5,000 on which has received dividend of about 1½ per cent.

Re-examined.—Goods taken back with consent of creditors, because witness had lien upon said goods.

REPORTS OF ACCOUNTANTS.

TO WILLIAM WORKMAN, ESQ.,

Chairman of the Committee appointed by the
Creditors of Messrs. Leslie & Co.

DEAR SIR,—Since the books of Messrs. Leslie & Co. have been in our charge, we have been incessantly engaged in writing them up, from their own entries. This has taken considerable time and labour, owing to the state of the books when handed to us. We also by instruction endeavoured to investigate the whole nature of their business; but we find upon posting up all Messrs. Leslie & Co's. own work, that it does not agree with their statements. Without reference, therefore, to their balance sheet, and as we cannot pro-

ceed any further, Messrs. Leslie & Co. being unwilling that we should make any new entries in their books, we conclude to report without any adjustment at present, and wait the farther instructions of the committee and Messrs. Leslie & Co.

REPORT.

So far as we can see, there does not appear to have been any loss in their business as wholesale grocers and commission merchants; on the contrary the sales indicate a profit independent of commissions, which are considerable.

The only losses we notice are as follows;—

On one lot of tea, say about $640.

On pork they purchased on joint account, say about $14,000 worth, about one third of which was sold at a profit; the remainder, say some $9000 in value, would appear to be all they can lose upon. Say that the remaining pork lost one third, or $3000, Messrs. Leslie & Co.'s probable proportion of that loss would be about $1,500.

The only other loss alluded to is by grain, in connection with a produce house in this city; we do not know anything definite of this, as their books do not shew any grain account; the extent of these operations, as we understand, was some 60,000 bushels of barley on which a loss was sustained. If this loss amounted to a third of the whole transaction, Messrs. Leslie & Co's. share of this loss, would probably amount to $10,000.

To cover above and current expenses, they should, as far we can see, have made more during the time they have been in business under their present firm.

Viewing the matter in this light, we have been searching for the deficiency in the estate in their books, and find that a considerable sum, say from $38,000 to $47,000 (until explained) would seem to have been paid by Messers. Leslie & Co., to retire the paper of Messrs. Leslie, Starnes & Co.; should a balance sheet and a knowledge of their position at the time of their dissolution be had, it would then be possible for us to say what amount (if any) would be available as an asset of the present firm. This, we think, together with the cash account, the personal account of the partners, the bills receivable account, and the auctioneer's or agent's accounts, will show the remaining deficiency of $51,000, as appears in their statements.

We cannot approximate the deficiency in these accounts without dissecting, entering, writing up and adjusting a great number of transactions which now seem to be irregularly made, and which we should be permitted to correct in the books. To do this we should

be furnished with the auxiliary books and papers which we have not yet seen; we mean particularly the bank books, cheque books, paid notes and cheques, also accounts of sales by auctioneers or agents, and generally such papers as may be needed.

Since the cursory statement made up by us from Messrs. Leslie & Co.'s own statement, showing about 6s in the £, things have altered thus:

SAY FOR THE BETTER, WE THINK, AS FOLLOWS:

E. S. Leslie's interest in the Seigniories Bourchemin and De Ramsay being considered liable to the estate, the probable value of which is, at 6 per centum, worth	$23,890.66
E. S. Leslie's property known as Wolfe Island,.....	20,000.00
E. S. Leslie's share of his mother's other property at his father's death, the whole of which is not now ascertainable, ...	....
Patrick Leslie's private estate, not extended in last statement on account of an asset for dower. We have since procured a copy of the marriage contract and do not think there can be any claim on the estate as it does not convey a mortage, and further it is only conditional on Mrs. Leslie's surviving her husband. This is set down in the settlement as worth	$8,400.00
Patrick Leslie's share of his brother's property at his father's death is also liable in an opinion, the value of which is now uncertain, as in his brother's case, ...	....

The discrepancy, amounting to $97,000, as alluded to in our cursory statement and in the first part of this report, requires to be looked into and a number of important accounts and transactions examined ere we can state what assets may be found in that discrepancy. There may be also something in the hands of the auctioneers or agents which can be only ascertained when accounts of sales are put into our hands.

And on the other hand things have altered for the worse, thus:

By the sinking of firms since failed—

Messrs. Mills, Mattice & Co.....	$21,134.00
T. M. Fraser.....	11,900.00
Noad Brothers	14,000.00

We have waited on Messrs. Leslie & Co. for information on their business generally and for subsidiary books and papers, and had the promise of both, but up to the time of making up this report we suppose they have not found it convenient to get them together for

us. We mention this as part of the reasons, in conjunction with the unadjusted state of the books, why we are not enabled to furnish you with a more definite numerical statement of affairs. We should only stultify ourselves and perhaps mislead you if we were to do more with our present information.

All which however is respectfully submitted by

Your obedient servants,

GREENSHIELDS & JOHNSON,
Accountants.

MONTREAL, 19*th November*, 1860.

To the Provisional Assignees of the Estate of the late firm of MESSRS LESLIE & CO.

GENTLEMEN,—In accordance with your instructions, I proceeded at once on receipt of the Books of Messrs. Leslie & Co., in April last, to examine their state and position, with which, however, I was partially acquainted, from having seen them, while in the possession of Messrs. Greenshields & Johnson.

A very cursory examination convinced me, that without a knowledge of the state of the Books of Messrs. Leslie, Starnes & Co., no satisfactory result could possibly be arrived at. I would simply remark, that no proper and uniform starting point for the Books of the new firm had ever been arrived at; that the books of Leslie & Co. had never been balanced, and those of Leslie, Starnes & Co. had not been balanced at time of dissolution; that the Bills Payable were charged indiscriminately with the Bills of the new and those of the old firm; that entries were made, with a misconception of their effect, and sums totally omitted on both sides of the cash book. In fact I felt it to be necessary to go over every entry, from their commencement, and to seek for the materials of entries never made at all, among the papers and preliminary books of the firm. The Books of Leslie Starnes & Co. were therefore necessarily written up and balanced, and it was only after several months subsequent close and scrutinizing investigation into, and completion of, the Books of Messrs Leslie & Co., that I at last succeeded in arriving at what I believe to be a correct estimate of the state of their affairs.

I have prepared statements for submission to you, which I trust will render my views comprehensible and satisfactory; and these statements are enclosed for your inspection.

In order to render them sufficiently clear to all parties interested, I shall be obliged to go fully into details, so that the large deficiency, shewn by Schedule F, may be satisfactorily accounted for.

This Statement shows a direct liability of, say.....	$135,986 26
Liability as Endorsers	96,515 24
Total liability	$232,501 50

To meet this we will examine the Assets:

First:—Bills Receivable as per Schedute E, which amount to $7899.04.

Of this amount it will be perceived that with the exception of $1242 99c. the greater part is held by the Ontario Bank, one note for $101 51c. by the Bank of Montreal, and the remainder is bad; therefore all that is available of this Asset is the sum of $1,242 99

The open accounts as per Schedule B. I have divided into three heads, viz. Good, doubtful and bad:—

Brought forward		$1,242 99
The good debts appear to amount to	$13,438 54	
But there is one item in that amount of $5883 40c. charged to the Sheriff, for goods seized and sold by him, and afterwards divided among the creditors, of which division I have no particulars. This, therefore, must be deducted from the amount of Good Debts, say	$ 5,883 40	
		$7,555 14
Of the doubtful debts, amounting to, say $24,487 97c. when the large amounts due by single individuals or firms, are considered, in addition to the difficulty experienced in collecting any large proportion of the debts usually classed under this head, I think it is a liberal view to take of the matter, if the value of this Asset be put down at one half	$12,243 98	$21,043 11
Deficiency,		$211,459 39

The bad debts speak for themselves, although I think it necessary to state, that the amount due by the late firm of Leslie, Starnes & Co. is put under this head, for the following reasons, viz :—

Ten-sixteenths of the amount due is owing by the partners in the firm of Leslie & Co., that being their proportion in the firm of Leslie, Starnes & Co., and is consequently unavailable; the balance of six-sixteenths only being due by Mr. Henry Starnes, the other partner in the firm of Leslie, Starnes & Co. But I understand that Mr. Starnes has a contra account, which he asserts to be correct, and to exceed the amount of his indebtedness. This contra account appears to be for acceptances of the latter firm, which were retired by him, and as, whether Mr. Starnes' view of it be correct or not, the balance would be contested by him, I think it safest to classify the whole claim as bad. It is worthy of remark in this behalf, that there are debts to a considerable amount still due by Leslie, Starnes & Co., the whole of which will probably fall upon Mr. Starnes as the only remaining solvent partner: and this would give rise to an additional difficulty in the way of establishing any liability against him.

In the balance sheet there appears at the Debit of Cash the sum of $7463.07, all of which, with the exception of an unaccounted for deficiency of about $1000, is in the hands of the Banks, and appropriated to their respective claims. This accounts for the item of Cash not appearing among the Assets.

The total deficiency, as shewn on the other side, amounts to the sum of $211,459.39. This deficiency is accounted for as follows :—

First :—By actual losses in business as shewn by the statement of Profit and Loss account	$21,271 47	
Appropriation by the Bank of Bills receivable as collateral and bills considered bad,	6,656 05	
Deduction from good debts of the amount distributed by the Sheriff	5,883 40	
Bad Debts	61,426 07	
Appropriation of Cash	7,463 07	
Liabilities, as Endorsers, per Schedule A	96,515 24	
Diffce	11	
Depreciation in value of doubtful debts	12,243 98	
		211,459 39

Trusting that these memoranda may render the statements I enclose intelligible to you, I have the honor to be, Gentlemen,

Your obedt. servt.,

JOHN BETHUNE, Jr.,

Accountant.

Upon the conclusion of the Plaintiff's case;

Abbott for ~~Plaintiff~~, said he had been for four days patiently awaiting the evidence of the fraudulent secreting by the Defendants of their estate and effects, which had been sworn to by the Plaintiff. He had made affidavit that he had been credibly informed, had every reason to believe, and did verily and in his conscience believe, that the Defendants *had* secreted *and* were immediately about to secrete their estate, debts and effects with intent to defraud their creditors and the Bank of British North America in particular: and that without the benefit of a writ of attachment that Bank would lose their debt or sustain damage. For making this affidavit the Leslies had caused him to be indicted for perjury, and it was for preferring that indictment that the present action was instituted.

To sustain such an action the Plaintiff must first shew that the proceeding complained of was at an end: then that it had been instituted *with* malice *and without* probable cause; and lastly that the Plaintiff had sustained damage. 2 Starkie, 681; 3 Phillips, 256; Mayne, 260; Sutton vs. Johnston, 1 Term Rep., 544. The Defendants contended that the Plaintiff had made no legal proof of any of these essential conditions of success, and urged upon the Court that there was no case to go to the Jury.

The Plaintiff had attempted to prove the termination of the proceeding, which was by Bill of Indictment, by producing the original Bill, with the finding endorsed upon it. This was not the proper evidence of the finding, for that could be proved only by the record or an examined copy of it. The return made upon this Bill to the Court, was the question; and the records of the Court constituted the only legal evidence as to what that return was.—3 Philips 394, 2 Starkie, 677: and the production of the Bill of Indictment, with the finding endorsed upon it, is not sufficient. 6, Car. & P. 101, 354. 2 Starkie, 183. Rex vs. Smith, 5 B. & C. 241. Roscoe's Criminal Evidence, 198. Philips loc: cit. 2 Saunders, p, 347. The cases went so far as to shew, that even if it were proved that there was no record of the proceedings of the Court, the endorsement on the Bill would not be received; as a *mandamus* would lie to compel the making up of the record. But here there had been proof by the Clerk of the Crown that there was a regular record kept of the proceedings of the Court.

But the other points on which the Defendants relied, went to the merits of the whole case. The burden of proof was on the Plaintiff to shew both absence of probable cause in the proceeding complained of and malice in taking it.

Both of these elements were essential to the Plaintiff's success. 2 Starkie, 681; 3 Philips, 256. 1 Term, 545. Purcell vs. McNamara. 1 Camp. 199; *et in notis.* "There ought to be enough evidence," (by the Plaintiff) says Tindal, C. J,, "to satisfy a reasonable man, that the accuser had *no* ground for proceeding but his desire to injure the accused." 6 Bing, 183. The Counsel also cited, 5 Bing, N. C. pp. 722, 725. 5 Bing, 354. 6 B, & C. 637. 2. B. & C. 693. 1 Am. Leading Cases, 213-5. It was said by a learned Judge (1 Campbell, 199) that this protection appeared "to be not only one of convenience, but of justice, or even of necessity, when it is considered how often it happens, that the facts upon which a prosecution is properly grounded, are confined to the knowledge of the prosecutor alone." If the absence of probable cause for the indictment had been shewn, however, malice might have been inferred from that fact, though no degree of malice could form a basis for presuming the absence of probable cause. Starkie & Philips, loc. cit. It had been argued by one of the Plaintiff's Counsel, that the unsuccessful termination of the prosecution was of itself evidence of want of probable cause, and a text writer had been cited to prove this. But it was not so. The case alluded to was from 4 B. & C. p. 21, and did not apply. It was said also by the other Counsel on the authority of Buller's, N. P., p. 14, that when the facts lay peculiarly within the knowledge of the Defendants, it shifted the burden of proof on them. But this was said on the authority of Parrot vs. Fishwick, (9 East 362) which did not support that doctrine and it had been formally disavowed as law. II Starkie, p. 683, *in notis.* In any case, the rule would not apply, for since the Plaintiff had taken that oath, the facts upon which he did so were peculiarly within *his* knowledge, and even on the erroneous doctrine on which he relied, he was bound to prove them. But the whole current of the authorities was against the doctrine. For it had been held that it was not sufficient to prove that the Defendants did not appear, and that the Plaintiff was acquitted. 1 Camp. 9.

Nor that after commencing a prosecution, the Defendants did not proceed to prefer an Indictment. 1 Camp. 204.

Nor that *the bill of indictment on being preferred was returned by the Grand Jury, not a true Bill.* 5 Taunt. 187. 1 C. & P. 138.

Nor that the Defendant suffered judgment of *non pros.* in the previous prosecution. 4 Taunt. 7.

Nor the mere discontinuance of the previous action. 1 Starkie, N.P. C., 50.

Applying these rules to the facts proved, it did not appear that

the Plaintiff had proved the want of probable cause by the Defendants. It seemed plain that if that affidavit was not true, the Defendants had probable cause for prosecuting. The Counsel himself had never for a moment believed that the Plaintiff had wilfully stated what he knew to be false; he supposed, as the fact appeared to be, that he had been misled by incorrect information or otherwise. But the question was not whether the Plaintiff was guilty of perjury or not, but whether his affidavit was true or not; for if it was not, the Defendants certainly had probable cause for indicting him. He appeared to accept this issue as the test, for the greater part of his evidence was introduced merely to attempt to shew that the Defendants had fraudulently secreted, or were immediately about to secrete their estate, and his replication details the grounds on which he swore. They were.—1. That the Defendants had made an assignment stipulating for a discharge before allowing their creditors to participate.

2. That this assignment had been made to their father, the father in law of one of them, and Mr. Starnes, who was *suspected* of being their debtor.

3. That these assignees were authorised to compromise Mrs. P. Leslie's dower, in any way they might think proper.

4. That the Defendants had refused to make an unconditional assignment.

5. That the Defendants had sold to their father real estate worth £10,000 for £3,000.

The facts as to the assignment appeared to be, that a provisional and temporary assignment had been made, by which everything the Defendants possessed, even to their policies of Life Assurance, had been assigned for the benefit of their creditors. That this assignment provided that the provisional assignees should retain the estate till the secondary liabilities matured, and in the *interim* should get the books posted up and balanced. That they should then report fully to the creditors. That if the debtors succeeded in compounding, the estate would be handed back to them; but if not, it was to be surrendered to any assignees the creditors might name, the debtors receiving a discharge. But that *if* the creditors refused a composition, and did not appoint assignees of their own choice, *then*, the provisional assignees had authority to wind up the estate for the benefit of the creditors, a discharge being still exacted; and for the purpose of such winding up, they had amongst other powers, that of compromising any contingent claim on the estate, having due regard to the security of the estate and the nature of the claim.

But this authority which was a proper and necessary authority for an assignee, could not be acted upon till the creditors had had the opportunity of appointing assignees of their own to wind up the estate. It was of course perfectly well understood by all parties, that any creditor might, by *saisie arrêt*, bring the estate before the Court and get his share without discharging the debtors, but equally of course the Defendants hoped that the creditors would accept so complete a surrender of their estate, and discharge them, and thereupon the assignment would have become valid. The deed in fact merely constituted a temporary deposit of the estate for safe keeping, a large number of suits being then pressed on to judgment, apparently to endeavour to secure some preference. As the committee of creditors objected to the deed, correspondence passed, and interviews took place, in which the Defendants offered to consent to any modification of the deed the creditors might wish, the only condition which they refused to waive being their discharge, and as to that they offered to take it subject to a condition that it should be null if any fraud or malpractice on their part should be discovered. There is nothing in such an assignment, the Defendants contend, which would warrant an affidavit that they were fraudulently secreting their effects.

But the Plaintiff says Mr. Leslie was their relative, Mr. Delisle connected with them by marriage, and Mr. Starnes suspected of being indebted to them. The creditors themselves chose Mr. Leslie as one of their assignees, and he was the largest creditor of the firm, except the banks. Mr. Delisle was perfectly accountable for his acts, and Mr. Starnes was cashier of the Ontario Bank, a large creditor, and has been shewn not to owe them a farthing. But when it is considered that the creditors had been furnished with the deed, to which were annexed Schedules describing every asset assigned; and under the terms of which they had only to name their own assignees, to enable them to take the whole estate into their own hands, it is obvious that the persons of the *ad interim* depositaries were of no consequence if they were solvent and responsible.

But again, it is said that the Defendants gave power to the provisional assignees to compromise Mrs. Patrick Leslie's claim for dower. There is no doubt but that if the claim was a valid one, such a power would be comprised within the general terms of the assignment, and it is a proper power for assignees to hold: but there was nothing there to justify them in compromising it if it was not valid, and if they had alienated any portion of the estate improperly for that purpose they would have been liable. The deed gave them no unlim

ited power; it required them to act in respect of contingent claims, with due regard to the security of the estate and to the nature of the claim. Any power was liable to abuse, but it did not follow that the granting a power, necessarily implied an intention that it should be abused.

As to the refusal of the Defendants to make an unconditional assignment, there is no doubt but that a minority of their creditors demanded such an assignment, about a fortnight after the estate had passed to their provisional assignees; but independent of the fact of an assignment having been previously made, the mere refusal to assign constituted no ground for an affidavit that the Defendants were secreting their effects. The late Statute required something more than that, and besides, the Plaintiff's affidavit was not made under that Statute.

The only ground remaining is the alleged sale by the Defendants to the Hon. Mr. Leslie in February, 1860, of their real estate in Upper Canada. No such sale is proved, nor in fact any sale whatever, by the insolvent firm to Mr. Leslie; but it is not denied that one of the Defendants, Mr. Edward S. Leslie, sold to the Hon. Mr. Leslie in February, 1860, certain reversionary rights which he held in Howe and Wolfe Islands, for £3000, payable in one, two, and three years, with interest, the proceeds of which sale were included by Edward S. Leslie, in his Schedule of his individual assets. The lands in question were leased upon leases having from six to eighty years to run, and the life interest in them belonged to the Hon. Mr. Leslie already. It is proved, that he was advised that the first creditor who should get judgment in Upper Canada, would have a special privilege on this reversionary interest, and as several were sueing, it was thought best to prevent any preference by transferring it to Mr. Leslie, and putting its value into the assets. A valuation was accordingly procured from Mr. Kirkpatrick, Q. C., of Kingston, who had managed the property for many years, and at his valuation the right was acquired by Mr. Leslie. All this appeared in Mr. Leslie's evidence for the Plaintiff, and he swears to the correctness of the valuation to the best of his knowledge. The testimony of Briggs and Busch, results in a confirmation of the valuation so made. Busch's valuation is on a ten years' credit, with *some* regard (he says) to the leases. As a test of his value, the first lot is under a 68 years' lease, paying $16 rental, and he values it at $400, or at a capital representing 4 per cent., but though in this manner he raises the value of the land itself to $39,000, he with difficulty brings himself to think that the rights of the Leslie family *might* fetch half that sum for cash. Taking from this $\frac{1}{3}$, according to Mr. Ramsay's estimate, for Mr. Leslie's life interest, the result would be a trifle over £3000. Making the calculation at the

Bank rate of 7 per cent, it would be under £3000. Briggs does not venture an estimate of the Leslie's rights; he values only the lands and improvements as they are, and the difference between the value of the two things may be shewn by the first lot in his estimate, which he puts at $2000, the annual rental for 68 years to come being $16, or ⅘ per cent on the capital he names. While in fact such a rental would not be estimated at more than $250, from which the value of the Hon. Mr. Leslie's life interest would have to be deducted.* Probably no further demonstration is required of the absurdity of such a mode of estimation. As the larger proportion of the lands are let on short leases, the rental may be supposed to approach nearly to the interest on the actual value of the property; and by this test also Mr. Kirkpatrick's estimate is confirmed. The gross rental is between £350 and £370, per annum, distributed among a large number of tenants proved to be poor; which of course would depreciate the value of the investment. The average net rental is only about £313. So that in fact, this ground also can avail the Plaintiff nothing, for every syllable of evidence on the subject, proves the perfect good faith of the parties, and an adequate consideration for the sale. Besides which, this was not the act of "Leslie & Co.," as stated in the Plaintiff's affidavit; but of one only of the partners in the firm.

As an after thought probably, finding all other grounds fail him, the Plaintiff had endeavored to show fraud in the Defendants by proving the payment of about $36,000 of the Bills Payable of Leslie, Starnes & Co., and their entry to the debit of "Bills Payable" in Leslie & Co's. books. That this was a very great blunder is plain enough—that it was not fraudulent is equally plain—for that amount stands in their books to the debit of Bills Payable with no entry to balance it—and therefore a single glance at that account in the Ledger would shew the discrepancy, and lead to the instant and unavoidable discovery of its cause. The Defendants admit with regret that their books were extremely incomplete and irregularly kept—but a thorough investigation which has been reported to the creditors, has established the absence of any wilful error. In the instance under consideration the entries carried with them a plain indication of their erroneous character, and if the error had remained undiscovered, it would not have benefited them.

Thus then, whether the circumstances upon which the Plaintiff relies to establish the correctness of his affidavit be examined separately or together, they do not constitute any evidence of fraud, and

* The result would be a deduction of about 92½ per cent. from this item, reducing the value from $2000 to $170.

certainly do not present a *scintilla* of evidence to justify the assertion that they had fraudulently secreted their effects. Every step they took was instantly communicated to their creditors—every explanation asked for was given them, and every concession they demanded was acceded to, except that which required them to give up their estate without a discharge: and even that they were willing to leave open, and dependent upon the correctness of their conduct. That they could not enforce the stipulation for a discharge is at once admitted; that to demand and insist upon it was a fraud and a secreting of their estate with intent to defraud their creditors is emphatically denied.

The question of probable cause when the facts are undisputed, is one for the Judge.—1 Term 544; 1 Wils. 232. When the Judge is of opinion, either on the Plaintiff's showing, or on the uncontradicted evidence for the Defendant, that there is a probable cause, it is usual to nonsuit the Plaintiff.—6 B. and C. 225; 1 Taylor, p. 37. This doctrine, however, the Plaintiff's own Counsel has stated, and therefore it is unnecessary to dwell upon it. If want of probable cause had been shewn, malice might have been presumed; but it has not, nor has any attempt been made to shew malice; therefore the Plaintiff has failed in both of these essential portions of his proof, and he has no case to go to the Jury.

In judging of the conduct and motives of the Defendants in presenting the indictment, there are other circumstances which must not be forgotten. At the very time that the three Banks combined to issue three *saisie arrêts* against the Defendants, the latter had the consciousness of having divested themselves of every shilling they possessed; upon such a condition only as is seldom or never refused to the unfortunate debtor. The same Banks that had simultaneously caused their Cashiers to charge the Defendants on oath with conduct as disgraceful as perjury, held judgments against them to the amount of about $10,000, upon which attachments equally stringent and valid might have been issued three days before, without the taking of any such oath; and five more judgments were then proceeding in course and were rendered within fourteen days afterwards. And there was openly circulated an agreement signed by the Banks and certain of the creditors, undertaking to pay not only their costs, but the *damages*, they might incur. The real and only difference between the creditors and the Defendants during the three weeks of negotiation which followed the execution of the provisional assignment, was not whether the Defendants should have a discharge or not, but *how* that discharge should be granted. The Defendants

wished to have it at once, but subject to its loss if they had done wrong. The creditors wished to grant it only after they had ascertained that the Defendants had not done wrong. Their own notarial demand of the 9th March, 1860, shews this. There was then only this difference of form between the parties. The creditors had the power of using an obvious and simple proceeding, having the same effect as the one taken, but involving no charge of fraud or personal dishonesty, causing no risk of damages, and very much less expensive; and yet they went out of their way to institute an unfounded and dangerous proceeding,—first procuring a bond of indemnity from the creditors against damages; tripling the costs by issuing *three* of such proceedings at once, when one would have sufficed; and this too when an ordinary *saisie arrêt* after judgment which they had themselves the right to issue, at a cost of four or five pounds, without any risk of actions of damages, would have served every purpose equally well. *Unless*, indeed, one of those purposes was to blast forever the character of the Defendants, by branding them as fraudulent bankrupts, under the sanction of the oaths of the three cashiers, and thus inflict upon them a lifelong punishment for presuming to think for themselves in the matter of the winding up of their own estate. Was it surprising that the Defendants concluded that such *was* the purpose of the banks, and seized upon the only open and public mode of vindicating themselves from such a charge, by forcing those who made it to prove its truth?

Under these circumstances the Defendants submit with confidence to the Court that the Plaintiff has failed to shew either the want of probable cause for their prosecution, or any malice on their part; and that on these grounds there is no case to go to the jury.

JOHNSON, Q.C., for Plaintiff, contended that the Defendants' Counsel had very ingeniously taken the opportunity of arguing his whole case before the Court; and in doing so, had assumed a position which he would not do before the Jury. He had sought a decision from one, which he would not venture to ask from twelve; but his design of obtaining by this means the opinion of the Judge beforehand upon the case was so palpable that it was impossible that His Honor could fall into it. In arguing his case, the Counsel for the defence had cast helter skelter before the Court all that had ever been written on the subject,—whether it had reference to the points at issue or not,—whether it had any bearing on the case or not, or could serve in any manner to elucidate the question.

There was an old and well understood rule of law that had been

laid down and acted upon by men whose names and abilities were matter of history; and who, however, respectable and learned might be the Judges of the present day, would stand forth pre-eminent for their wisdon and sagacity, to all time. The rule he referred to had been laid down by the late Chief J. Reid; he had heard it when a child—and recollected and had seen it acted upon ever since. Hundreds of cases existed in which it had been approved of, and in which it had served as a guide. The rule was this, that while we must look upon English law with respect and reverence, we are to follow it as a guide and not as an inexorable Judge; and that we are not to be further bound by its decisions than in so far as they were based upon similar circumstances to those in which we stand. In the question of the mode of proof of the termination of the proceeding taken by the Defendants against the Plaintiff, an exemplification of the proper application of this rule occurred. In England the endorsement of the Bill of indictment might not prove the finding, because there the production of the Bill itself did not prove the caption, which was the whole length to which the authorities went which had been cited by his learned friend. The caption shewed that the Bill was preferred at a certain court or session of a Court before a certain Judge—and as these matters all came before a Court at *nisi prius* a record on parchment was made up and transmitted to the Court at Westminster. Of course this record or an examined copy of it was the proper proof of the caption of the indictment. But here no caption was required. The law provided that the Court should sit on certain days. The day on which the Bill of indictment was dated was one of those days, therefore the Court must have sat on that day—and there was not the necessity which existed in England for the making up of the record.

But in this case even in England no record would be required because there was no case. Only the preliminary step in the case had been taken, and it had failed. There never therefore had been any valid proceeding at all, and it had no termination because it had no beginning. Its invalidity surely was proved in the best possible manner by the production of the proceeding itself, with the decision of the jury to which it was submitted endorsed on the back of it.

But the Defendants had admitted all this. There was no occasion for any proof of it, for they had themselves expressly admitted the truth of it in their plea. (The learned counsel proceeded to read a portion of the Defendants' first plea; in which it was alleged "that by reason of the premises the Defendants had reasonable and probable cause for preferring the said indictment.")

Here was a distinct and clear admission of the very point which his learned friend had cited authorities to shew had not been proved. And moreover it was not *always* necessary to prove the termination of the proceeding; for it need not be proved if not put in issue, and the plea of not guilty did not put it in issue.

As to the want of probable cause, the fact of the Grand Jury having thrown out the Bill was sufficient proof of that. These were elementary principles which every one knew, and it was extraordinary how often we were obliged in this country to discuss elementary principles that were to be found in every manual. He held in his hand one which was admitted to be one of the most able of them all, but he would say that in England one would not be permitted to cite from any manual. He then read from 2 Saunders on Pleading and Evidence, *p.* 341, to the effect that a bill having been thrown out by the Grand Jury was sufficient to warrant an inference of want of probable cause. This was to be found in all the manuals —the same doctrine was laid down by Selwyn, and by Buller. And there could not be a shadow of doubt on the subject. Apart then from the circumstances of the case, the fact of the Bill having been ignored was amply sufficient to sustain the Plaintiff's case.

But on reference to the proof, the intentions of the Defendants was plain, and it was monstrous to pretend—and it was a pretension which no British jury would ever sustain, that a man in good faith upon the advice of his counsel making a mere formal oath of the kind made by the Plaintiff, the very words of which are prescribed by the statute, was to be indicted for perjury.

Laflamme, R., for Plaintiff, argued that there could not be more full and complete evidence of the fraud of Defendants than had been adduced on behalf of the Plaintiff. The execution of the very deed of assignment is in itself complete evidence, and constitutes a secreting of their estate with intent to defraud. Here were persons owing debts to the amount of $300,000 with assets only amounting to $21,000 putting those assets into the hands of their friends, subject to an express provision that no portion even of this small pittance shall be paid to their creditors unless those creditors shall execute in their favor a full and complete discharge from all liability. By the deed they declare that their assets shall be realised, and dividends thereof shall be declared and paid only to those creditors who shall discharge them, and that the dividends of those who refuse shall be retained and paid over to those who accept—so that suppose only a few of their own friends accept the assignment, the whole of the assets would be divided among those friends to the complete exclusion of all the others.

Could there be any more complete secreting of their estate than that? But there was a still more glaring fraud in what they had done. Was it not admitted everywhere that a fraudulent preference of one creditor over another was a secreting within the meaning of the law, and had they not given their father a fraudulent preference? Had they not given him their lands in Upper Canada proved to be worth $40,000 for $12,000 payable only in one, two, and three years? and by this means did they not fraudulently pay him on account of his debt to them the amount of the difference in value between what he promised to pay and what the property was worth?

But no matter what was the consideration, the Defendants had no power after they became insolvent, to dispose of any part of their estate. The moment they failed, it became the property of their creditors, and they ceased to have any control over it whatsoever. It is not for them to judge what is to be done with it; their creditors must decide that; and if they attempt to dispose of it on any condition or for any price, no matter what that price may be, it is a secreting in the eye of the law.

But in what does secreting consist? Surely it is not necessary that a party should actually hide or conceal his effects in order to constitute a secreting, for a man cannot secrete a house or a farm, and yet there is no doubt he may act with reference to a house or a farm in such a manner as to constitute the act of secreting with intent to defraud. Secreting in fact consisted in putting property into the hands of third parties with the intent to prevent creditors from receiving it or its proceeds, and that had been done by the Defendants in this instance. In a recent case before our own courts it had been held that any transaction by which any obstacle was thrown in the way of creditors was fraudulent, and they all concur in holding any deed by which a debtor assigns his estate upon any condition of discharge —or attempts to impose any condition upon his creditors—fraudulent and null. And such was undoubtedly the law in this country. Ord. of 1609; Isambert, Vol. 15, p. 350; Shearing vs. Meunier, 7 L. C. Rep. 250; Cumming vs. Smith, 10 L. C. Rep., 122; Macfarlane vs. McKenzie, 5th Jurist, No. 4, p. 4. This last was the last case in point—and in it the Court emphatically pronounced the fraud and nullity of such a pretended assignment and pointed out the remedy which a recent statute has provided, viz., that if an insolvent debtor refused to assign his estate—to make a *cession de biens*—he was liable to be arrested or to have his effects attached—as being guilty of secretting his estate and effects with intent to defraud his creditors.

But there was another point upon which there could be no doubt of

the fraudulent intent. Mrs. Patrick Leslie, the daughter of one, and the daughter-in-law of another of the provisional assignees, had made a claim upon the estate for four thousand pounds of dower. Well what did the insolvents do? They put what then was left of the estate into the hands of these relatives and said to them, make haste now and compromise this claim in any way you may think fit, we give you full authority. Yet this claim is utterly unfounded and was so declared to be by his Honor the Judge now presiding. Was not this disposing of their property with the intent to defraud their creditors?

But it cannot be said that there is any part of these transactions in which there is not a presumption of fraud. The mere fact of the relatives of the assignors being constituted assignees is an element which of itself creates a suspicion of fraud. (Burrill on assignments.) and it has been always so held in our own law. And it is impossible to find any law which enables an insolvent debtor to give a preference to any creditor. If there were any such law let his learned friend cite it. He called upon him to show that any such law existed.

But we have a statute which regulates this very species of transaction, provides for what is to be done, and the penalty for not doing it. (The Counsel here read a portion of the clause of the Judicature Act of 1857 respecting *saisie arrêts*, &c.) Here then was what the law provided. On the 9th of March, 1860, the Defendants had been called upon to obey that law and they had refused. They said we have put our estate into the hands of assignees of our own choosing, and the creditors may make the best of it. They were offered a discharge if they would give up their estate, provided their conduct had been correct, and they refused it.

There was no doubt that a gross fraud had been attempted in which not only the Defendants but the Hon. Mr. Leslie, Mr. Delisle and Mr. Starnes had participated. The Plaintiff had only done what he was perfectly entitled to do; he had justified himself fully and was entitled to a verdict.

Abbott, for Defendants, in reply, said he should detain the Court but for a few moments, as apart from the exaggerations of figures and facts, which were answered by the record, there were only two or three points to which he would refer. Mr. Johnson had talked largely of hundreds of cases, but he had been satisfied with citing a text book referring to other text books, and all resting on the case of Nicholson vs. Coghill; 4 B. & C. p. 21. That case did not support them for it was a case says Chief

J. Abbott (p. 23) which " differs from all the cases which have been cited, for the present Defendant *was the actor in putting an end to the former action, he voluntarily discontinued it.*" This shows that if he had not voluntarily discontinued it, the ruling would have been the other way. As to the reason for refusing to receive the endorsement on the indictment as evidence of the finding, being only that the indictment does not prove the caption, it is insufficient to warrant us in rejecting the established rule, for if that were the only reason, (which it is not) the caption does something more than record the *date* of presentment, it records the whole proceeding upon the indictment, its being preferred and found, or not found, besides the date. As to the pretension that the finding is admitted in the Plea, what Mr. Johnson had read shewed it to be groundless, for it only referred to the cause for preferring the bill.

In a portion of the argument of Mr. Laflamme he would be disposed to concur; but not in his doctrine that by insolvency the insolvent debtor lost *all* power of disposing of his assets. He (Mr. Abbott) had advised his clients, and had admitted from the commencement of the case, that they could not *enforce* the stipulation for a discharge; that until the creditors accepted it the condition was of no value; and that any creditor who chose could set aside the assignment and share without discharging. But that an insolvent could not dispose of any portion of his property for its full value, especially when by so doing he benefited his estate; and that by stipulating for a discharge he committed a fraud upon his creditors, were two propositions which he could not admit, and which could not be sustained by any of the authorities cited by the counsel for the Plaintiff. In every one of these cases some prejudice caused to the creditors is spoken of as an essential element in operating the nullity of the act; and in none of them is an assignment stipulating for a discharge characterized as a fraud.

On the contrary, in the last case of Macfarlane & McKenzie, in which an assignment had been made stipulating for a discharge, in nearly the precise terms of the present one, the Court set the assignment aside; but, said Aylwin, J., in delivering the judgment of the Court of Queen's Bench,

> This case turns upon the sufficiency of a voluntary assignment made by an insolvent debtor, in favour of two of his creditors, containing a condition, that he should have a final and complete discharge from his creditors on their obtaining their respective dividends from these two assignees.
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> * * * *
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> This condition is quite illegal, and is enough of itself to vitiate the deeds as regards

Macfarlane, seeking his recourse by legal process as a creditor. Neither the assignees, nor the debtor, had any right to impose such a condition on any creditor.

* * * *

But he says "There has been no design to defraud, nor any acts perpetrated that could be designated as immoral, by any of the parties here. But the attempt has been made to introduce an insolvent system which does not exist, and is unknown to our laws.

* * * *

The learned Counsel had been equally unfortunate in referring to the Statute of 1857, because under that act, the "continuing to trade" as well as refusing to assign, was required to constitute a constructive secreting. The words were, if a debtor notoriously insolvent, refuses to assign, &c., *and* continues to trade, he shall be held to be secreting his estate.

MR. LAFLAMME.—In Macfarlane & Beliveau, the Defendant had ceased to trade, and yet his Honor now on the Bench, held he was rightly proceeded against, under the Act of 1857, because he was collecting his debts.

MR. ABBOTT.—There was no difficulty about that. Collecting his debts *was* continuing his trade within the meaning of the Act; for the Act was passed to prevent an insolvent from pocketing the proceeds of his goods or assets, and thereby placing them beyond the reach of his creditors. There was no pretension here, that the Defendants were collecting their debts, or otherwise continuing their trade, for they had placed all their assets in the hands of solvent assignees, and had provided their creditors with a list of the assets so assigned, for which those assignees were responsible.

CHARGE.

The Counsel for the Defendants have applied to the presiding Judge for a judgment at the present stage of proceedings in this case, as it now rests upon the testimony adduced only by the Plaintiff, and they have contended that they should not be put upon their defence for two chief reasons which they maintain are essential to support the Plaintiff's action and which the Plaintiff has not proved.

1*st*. The establishment of the final termination of the criminal proceedings against the Plaintiff upon the bill of indictment preferred against him and referred to in his declaration; and 2*nd*. the establishment of want of probable cause and also of malice by the Defendants. They have contended that the Plaintiff has failed in the proof of both these particulars and they have supported their objections by

reference to authorities of law and to the evidence of fact adduced in the case. On the other hand the Plaintiff has denied the pretensions of the Defendants both of law and fact, and asserted that proof has been adduced not only of the termination of these proceedings but also of probable cause from which malice might be properly inferred. In support of the Plaintiff's pretensions one of his Counsel has referred with evident satisfaction to the *dictum* then most opportunely communicated to the counsel, of a long deceased, very learned and esteemed chief justice of this district to the effect that our law was sufficient for such cases "but that the law of England might be used as a guide but not as an inexorable judge." It will be gratifying to the Plaintiff's Counsel to be assured that although the observations in themselves are somewhat trite and far from novel, the principles involved in them have been adopted and observed by this Court, and that their obvious propriety will find their application in the decision of the points submitted.

Upon the first point urged by the Defendants, the want of proof of the termination of the proceedings upon the Bill of indictment, it may be observed that the original bill preferred to the Grand Jury is regularly endorsed as not found; "No Bill;" and has been produced by the Clerk of the Crown, its proper legal custodier, who states that it was so preferred to the Grand Jury, sitting in March term, 1860, of the Court of Queen's Bench, himself having been one of the witnesses thereon, that the Defendants were the prosecutors, that it was returned by the Jury to that Court and there registered; and the copy fyled by the Plaintiff as his exhibit was then proved to be an examined copy of the original. It is true that the authorities from the books require the proof of criminal proceedings by the production of the record, the Court of Queen's Bench on the criminal side being a court of record, and of course if the bill had been found and proceedings had thereon, the record must have been produced to establish their termination. Here, however, the bill was not found, no proceedings were had or could have been had upon the unfound Bill, and the only proceeding that could be adopted was its official reception being registered and recorded as 'No Bill.' However strict the mode of English proceeding may be in similar cases, I am not prepared, here, with our greater laxity of procedure, to hold that the production of this unfound Bill is not proof of the termination of proceedings upon it, which indeed could never have been had upon it criminally; and I hesitate the less in over-ruling this first objection because the adjudication of this case turns mainly if not altogether upon the second ground of objection taken by the Defendants, the

alleged failure of evidence to prove the want of probable cause and malice on the part of the Defendants.

Upon this ground it must be observed that in actions of this sort for malicious prosecution the most esteemed authorities of law, the best writers as well as reporters concur in opinion, that the foundation of an action of this nature is the malice of the Defendants either express or implied; which at the same time must be accompanied with the want of probable cause:—from the latter malice may be inferred, but the most express malice will not imply the want of probable cause. It will be manifest therefore that want of probable cause must concur with the malice charged, to support this case, inasmuch as this kind of action is for a prosecution which, upon the stating of it, is manifestly legal; and therefore the ground of the action is that a legal prosecution was carried on without a propable cause; and hence this ground is essential, because every other allegation may be implied from this, but this must be substantively and expressly proved and cannot be implied: malice may be implied from the want of probable cause but will not in itself imply want of probable cause. The leading case of Johnstone vs. Sutton, decided in the House of Lords, whose opinion was expressed by those most eminent Judges, Lords Mansfield and Loughborough, has settled the principles which I have stated and they have served as a rule and guide for all sound decisions and legal opinions from that time to the present. Those very eminent Judges declare "this action ought not to be maintained without rank and express malice and iniquity; the grounds of it are, upon the Plaintiff's side, innocence; upon the Defendant's malice." Stephen's *nisi prius* sustains these principles, and the present Lord Wensleydale, the eminent Baron Parke, in Mitchell vs. Jenkins 5 B. and C. 594, affords his illustration of the law of evidence applicable to the question of malice in these terms: "I have always understood, since the case of Johnstone vs. Sutton, which was decided long before I was in the profession, that no point of law was more clearly settled than that on every action for malicious prosecution or arrest, *the Plaintiff must prove what is averred* in the declaration—namely that the prosecution or arrest was malicious, and without reasonable or probable cause. No malice, however distinctly proved, will make the Defendant liable; but when there is no reasonable or probable cause it is for the Jury to infer malice from the facts proved. The term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus* and as denoting that the party is actuated by improper motives." In such cases it is also held that the Plaintiff

must adduce enough evidence to satisfy a reasonable man that the accuser had no grounds for proceeding against him but his intent to injure the accused," 6 Bing. R. 183, and cases cited. It is not enough that the bill of indictment being preferred was returned to the Grand Jury not a true bill. Books such as Selwyn, N. P. and Buller, N. P., cited as authorities by the Plaintiff's Counsel, which are almost out of present use and but little referred to, cannot out-balance text writers, reporters and judges of the present day. Stephen's *Nisi Prius*, p. 2277, says, where the Bill has not been found by the Grand Jury an action cannot be supported without evidence of express malice as well as of the want of probable cause—5 Taunt. 187, 1 Carr. & Payne, 138. I shall only add to them 1 Archbold N. P. 590, a modern standard work, where in the last edition it is observed: "In all those cases (malicious prosecution) it must be proved that the Defendant acted maliciously and without probable cause." To these add 1 Taylor on Evidence, p. 37 & 9; numerous citations might be added to establish the necessity in actions of this kind for requiring the concurrent proof of malice and want of probable cause, because as before observed if want of probable cause cannot be established by the Plaintiff on evidence, no action, on principles not only of justice but of necessity can be allowed to lie against a Defendant. From all the authorities above adverted to, it might be repeated that the proof by the Plaintiff, of want of probable cause and of malice on the part of the Defendants, are both required. This necessity is plainly and expressly admitted by the Plaintiff himself, insomuch as by his declaration of demand of damages he complains in substance in the terms of his declaration, that the Defendants preferred the bill of indictment against him to the Grand Jury on the 29th March, 1860, and thereby injured him; that the Bill was false and scandalous against him; that the Jury did not find the Bill; that all this was done by the Defendants "maliciously intending to injure the Plaintiff" "and falsely and maliciously and without any reasonable or probable cause." These are substantive allegations and assertions, and under the *dictum* of the late learned Chief Justice prominently brought forward by the Plaintiff's Counsel, being alleged in the declaration as grounds of action, required according to our common law in this respect, to be substantively and positively proved. According to the learned Baron Parke, in Mitchell and Jenkins, *the Plaintiff must prove what is averred in his declaration.* My impression is that our law is more positive and strict in this matter than that of England, in which implications are admitted which find no place in our law system. The Plaintiff must

therefore prove against the Defendant, his allegations of their falsehood and malice and their want of probable cause. The question is, has he proved them or any of them. To ascertain this the circumstances of the case must be examined as they lie in evidence. It is not my purpose to detail the evidence adduced, it will be sufficient to state briefly some of the leading points. It appears that the firm of Leslie, Starnes & Co., in the spring of 1858, became the firm of Leslie & Co., by the retirement of Mr. Starnes at that time; that Leslie & Co., the Defendants continued the present business until their stoppage in January, 1860, when they called their creditors together to submit to them the state of their affairs. Thereupon the creditors agreed upon the nomination of a committee with the consent of the Defendants, who promised to afford every facility; and agreed to appoint an accountant to examine the Books which had not been regularly kept, and without any balance made up, either at the close of the former partnership or during the time of the latter one. Five or six weeks were spent in the examination of the books by the accountants to whom the books had been delivered by the Defendants for the purpose of investigation required by the creditors; but during all this time the usual course was adopted of adding to the difficulties and inabilities of failing persons by numerous actions at law, adding large legal expenses to an estate already unable to meet its legitimate indebtedness. This was done by the processing creditors for the purpose of securing advantage to themselves to the exclusion of the other creditors. To prevent such a result and put a stop to additional worse than useless expenses, the Defendants on the 23rd February, 1860, executed a provisional and temporary assignment to the Hon. James Leslie, A. M. Delisle and Henry Starnes, Esquires, together with subsidiary deeds of sale of real estate for the perfection and completion of the purposes of the assignment. This provisional and temporary assignment was executed for the protection of the estate and at the same time for the benefit of the creditors. The evidence also shows that on the eleventh day of February, 1860, Edward S. Leslie one of the Defendants conveyed to the Hon. James Leslie, his father, all his reversionary interest in certain lots of land situate in Wolfe and Howe Islands near Kingston, in U. C., of which the father had a life interest or usufruct. The price agreed upon was £3000, settled after a valuation to that amount made by Mr. Kirkpatrick, Q. C. of Kingston, for several years agent of the Leslie's for these lands; and the price was paid by the purchaser's notes of hand of £1000 payable at 1, 2, 3 years with interest which were placed amongst the assets of the firm and are set out in the Schedule to the

assignment as the produce of the lands in question. This temporary assignment was immediately submitted to the creditors by the Defendants and examined by the former at their meeting on the twenty-fifth of February, at which Plaintiff was present as representing the Bank of B. N. A. At that meeting it was resolved to require from Defendants an assignment to Messrs. Workman, Maitland, Ryan and the said Hon. James Leslie, for the benefit of the creditors. Several subsequent meetings of creditors were held, and at one of the 15th March, the three Banks, Montreal, B. N. A. and Molson's, were requested by the creditors to take out attachments against the Defendant's estate. To this they assented on the subsequent day, and in consequence the Plaintiff for his Bank, and about a dozen more of the creditors, signed an agreement to share the expenses among them. This was followed by attachments by those Banks, that of the Bank of B. N. A., having issued upon the Plaintiff's affidavit made by him on the 17th March, in which originated the criminal proceedings afterwards adopted by the Defendants against him on the 29th March, and as a final result this action. With respect to this action it must be stated distinctly as important in itself that it did not originate with the Plaintiff, as the creditors minute book shews that at a creditor's meeting of the 5th April, at which the Plaintiff and the creditor's law adviser, Mr. Laflamme, were present, with about a dozen of creditors, these latter requested the Plaintiff to institute an action of damages against Defendant, and upon his assent to their suggestion, they requested Mr. Laflamme to conduct the same and to associate Messrs. Johnson and Henry Stuart with him. The action and the expense are necessarily the creditors'. The firm's transactions extended therefore fromJanuary to mid-March1860, during which time the creditors were made fully aware of them all.

The Plaintiff's counsel have selected particular grounds for reply to the Defendant's second objection, resting the one upon the assignment and its conditions, the other upon the sale of the lands to Hon. Mr. Leslie ; they have adverted to the circumstance that the assignment was made to the father of the Defendants, to the father in law of one of them and to their late partner, and have insinuated a suspicion against it because made to relatives.

There is no law which makes the nomination of relatives in itself, fraudulent,more especially where the transaction is merely temporary and provisional for the safe keeping of the estate and the advantage of the creditors generally, and not for the absolute personal advantage of the relatives. The solvency of these temporary assignees has not been questioned nor their means doubted to account for any

receipt by them of the firm's assets. Moreover the Hon. Mr. Leslie is known to the creditors as the father of their debtors, the Defendants, and is the purchaser of the lands of one of them; and so far from being suspected, is selected by the Creditors themselves as one of their own proposed assignees. As to Mr. Delisle, alleged to have been named solely in the interest of his daughter, the plaintiff has asserted that his nomination was suspicious because the assignment gave assignees power to compromise her pretended claims for dower. Now such an assertion is unfounded. It is not in terms in the deed; although in this as in many other assignments, power is given to the assignees to settle contingent claims: but this claim under the marriage contract, whatever it was, could not touch or rank upon the partnership assets, and was moreover contracted years before the stoppage. It is only necessary to add that the power of the provisional assignees under the deed as to contingent claims upon the estate was very limited, and could only be exercised after an opportunity had been afforded to the creditors of themselves appointing assignees. The power is not improper nor unusual in itself and it has neither been alleged nor proved that it was either intended to be used for a fraudulent purpose, or so acted upon.

The Plaintiff alleges that the condition of discharge in the temporary assignment is illegal.—Granted, no debtor can legally impose such a condition upon his creditor, and the clause of discharge is not binding in law, but its insertion in the deed of itself was not a secreting of the estate, nor proof of it. The judgments of the Superior Court and Court of Appeals referred to in argument do both indeed declare such a clause illegal but they do not make it fraudulent. The distinction is a broad one between an unavailing stipulation and a fraudulent act: an assignment may be unavailing as against the policy of the law and may be either annullable or *ipso facto* null, and yet it may not be a fraud, much less a secreting by the stipulent of the deed. The temporary and provisional character of the assignment until the creditors themselves should receive the estate; its provisional and beneficial purpose; its being deemed to prevent law expenses and the sacrifice of the estate by the Sheriff, who has been declared by the Judgment of the Court of Appeals to be the only legal assignee for winding up insolvent estates; the restrictions upon the temporary assignees imposed by the express terms of this provisional assignment; all concur in removing every suspicion of fraud on the part of the Defendants and should have caused the Plaintiff as a cautious man to hesitate before taking his affidavit; even though the venerable Edict of Henry 4 of France in 1608, pro-

mulgated for a country and at a time when commercial transactions were totally dissimilar to those of modern commercial countries and times, might be used as matter of law merely to set aside the assignment.—But would not that same illegality attach to the assignment proposed to be taken by the creditors who asked it, few in number as they were, yet even now contending that the legal result would of itself make the assignment a fraud or a secreting. Then as to the Prov. Act 1857, its provisions are plainly conservative: it defines a secreting by the debtor, as the effect, not alone of his refusal to enter into arrangements or to make a composition with, or a cession de biens to, his creditors, but because at the same time of his so refusing he is continuing to carry on his business as usual. The statute remedy was intended to stop his trade, by the forcible seizure by law of his means of trade, thereby to prevent the trading debtor from dissipating or making away with his estate and effects. This is the full extent of the statute, and it is fair to infer from what it did provide against in express terms, that the presumption of secreting so established by it could not apply to a state of things upon which it was silent, or to debtors who had ceased to trade, as the Defendants had done. And indeed this was the judicial ruling in the case of Macfarlane and Beliveau. The Plaintiff appears to have felt this difficulty by making his affidavit in the terms of the old law, which contains no such provision about presumption of secreting; and not in the terms of the Statute of 1857 which does. Why did he make this special selection? All agree that the stipulation of discharge in the provisional assignment was entirely unavailing, because any creditor might obtain his share in spite of it.

But granting its unavailing character, it is not necessarily a secreting of the estate, debts and effects, of the Defendants, Leslie & Co., as carefully sworn by the Plaintiff.—Nay so anxious were the Defendants to satisfy the creditors in this matter, that they proposed a stipulation against themselves, that the discharge, when granted, should not avail to them if their creditors should discover any fraud or malpractice committed by them. If this is an indication of secreting, it is strange that the creditors themselves should have offered the Defendants a discharge by their protest and demand of the 9th March, as shewn in their Minute book, and the special answer of the Plaintiff, who was aware of the fact at the time he made his affidavit. A difference of opinion did in fact exist between the creditors and the Defendants as to the mode in which the discharge itself was to be given, but the condition for a discharge was there and existed. This was known to the Plaintiff; how then

could the deed containing stipulation of discharge be a secreting of the estate, when the creditors and the Plaintiff himself were offering a discharge to the Defendants?

Again with reference to the land sale: it must be observed that the uncontradicted evidence of record is, that the sale was made to prevent preferences given by the law of Upper Canada, to the first seizing creditor of the debtor's lands, to the exclusion of the other creditors. Mr. Leslie has also proved that he might, as advised of the effect of that law, have applied the entire purchase money in part liquidation of his own claim against the Defendants of from £7000 to £8000; instead of which it forms part of the estate assets.—The evidence was precise in character; the sufficiency of the price given as the value of the land has been proved; and the entire capability of Mr. Kirkpatrick to value it is admitted by the evidence adduced by the Plaintiff.—His evidence only corroborates the validity of Mr. Kirkpatrick's valuation upon which the sale was made, because Busch himself admits that the value under a sheriff's sale would reduce his valuation by one half; that such sales were very hard sales; and doubtingly states that they might bring one half of his estimate; from which if the time of the unexpired leases, Mr. Leslie's life interest, and the charges generally be deducted, the balance will be found not to differ much from that of Mr. K. As therefore in this there was no prejudice, there was no fraud and therefore in itself no secreting. But here again it must be remembered that this sale was made by one of the partners, of his individual estate, or his reversionary rights in those lands.—Now this in itself cannot justify the terms of the affidavit as pretended by him in argument and in his special answer—that the *Defendants, Leslie & Co.*, have secreted and were secreting the estate debts and effects either of the firm itself or of the other partner of the firm; nor justify the affidavit made by the Plaintiff whereby the attachment before judgment issued to attach the estate debts and effects of the firm. If the rule as set up by the Plaintiff be good for two partners it must be good against twenty: and if one of these should secrete his private effects an attachment would thereupon justifiably issue against the firm and against his 19 copartners.—Such a pretension is monstrous and ridiculous. It is true that the Defendants' books were badly kept and somewhat erroneous, yet the error spoken of by the accountants and shewn by the Plaintiff's counsel, was so palpable on the very face of the books themselves that a mere tyro in book-keeping would see it almost without examination, and in fact it was at once seen by the accountants on opening the books. It appears that upon the retirement of Mr. Starnes in the spring of 1858, a large amount of

current liabilities were outstanding, and that bills payable to the amount of $36000 due by that firm, retired by the firm of Leslie & Co., were entered by the latter as their own liabilities instead of being carried to the account of Leslie Starnes & Co.; of this amount, however, the Defendants were liable themselves for $\frac{5}{8}$, and Mr. Starnes for $\frac{3}{8}$; moreover this error of entry was made in the spring of 1858, twenty months before the stoppage; and of course at the time of the commencement of the new firm.—It is not credible that this palpable error of the spring of 1858, should be taken as ground for the affidavit of secreting by the Defendants, made by the Plaintiff on the 17th March, 1860, that the *Defendants, Leslie & Co.*, since their stoppage had secreted and were secreting their goods debts and effects. No concealment has been shewn or proved against the Defendants in their transactions with their creditors; the latter were made acquainted with the steps taken; the assignment was communicated as soon as executed, and exhibited full schedules of the firm's assets, including the land sale, the private property of the Defendants, the amount of their liabilities, names of creditors and debtors; and not only were all their circumstances in the knowledge of the Creditors, but also in the knowledge of the Plaintiff, who strange to say by his special answer has recited and referred to these facts and circumstances, and as fully observed upon them as myself in these observations.—And has relied upon them as his justification; as the grounds upon which he relied to establish the truth of his affidavit. As already observed all these grounds and assertions, together with the facts and circumstances adduced in evidence in this case, have been considered by me, and in them I have failed to discover the justification stated, or any valid ground for the Plaintiff's affidavit. The Act of 1857 did not apply nor was it used; in fact, the attachment which issued upon the Plaintiff's affidavit was before judgment, at a time when the Bank of Montreal, one of the three attaching banks, had already two judgments against the Defendants for a large amount under which an attachment might have been made against the Defendants equally as effective as those made before judgment by those attaching banks, including that under the Plaintiff's management, and without the necessity of any affidavit. In any case the mere refusal to assign of itself alone, did not justify the Plaintiff's act; to do so the continued trading of the Defendants must have been affirmed also, which was not the case, nor was there any circumstance indicating on the part of the Defendants either retraction or secretion of their estate and effects.

Upon the whole case it must be observed that, though there is

nothing to evidence secreting, this is not a trial of the Plaintiff. The Court is called upon to determine from an attentive examination of the case itself and of the facts and circumstances proved whether the Plaintiff has established a want of reasonable and probable cause: if he has failed to do so this action cannot be maintained. Malice on the part of the Defendants is also an ingredient in this action. Both are required to be proved and established to support it, but it is only as to the former, the want of probable cause, that, my opinion can be required at this stage of the proceedings in this cause. The question of probable cause is one at the disposal of the Judge and for his decision alone. If the evidence had been conflicting, to use the language of the Judge in Haddrich vs. Hislop 12 Ad. & El. N. S. 269, it would have been my duty to put to you, gentlemen of the Jury, any preliminary question of fact that might require determination in consequence of such conflict; and upon the finding thereof to decide whether such facts found shewed probable cause or not.—This is shewn in the case of Blackwell vs. Dod, 2 B & Ad. 184, where Lord Tenderden observes, "I have considered the correct rule to be this, if there be any fact *in dispute* between the parties, the judge should leave that question to the Jury, telling them if they should find in one way as to that fact, then in his opinion there was no probable cause and their verdict should be for the Plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant. So also in Turner vs. Ambler, 10 Ad. & E. (N. S.) 253, the Judge put questions to the Jury as to certain facts in dispute and as to the damages; the jury answered as to the facts and assessed the damages at £80. Upon which he ordered the verdict to be entered for the Defendant on the ground that there was probable cause; with leave to the plaintiff to move for the verdict.—This was afterwards done, but the rule was discharged. So also in Mitchell vs. Williams, 11 M. & W. 205, the Judge left three questions to the Jury upon the disputed facts of the case, which they answered.—He then told them there had been a want of probable cause and left nothing to the Jury but the damages: see also 2 Ad. & E., N. S. pp. 194, 195. In this case there is no conflict of testimony. The facts are altogether uncontradicted, and the rule to be found in I Taylor, on evidence, pages 37, § 26, necessarily must be our guide.—In this the author speaks the language of the Courts for many years previously: "probable cause is a question exclusively for the Judge, the jury being only permitted to find whether the facts alleged in support of the absence or presence of probability and the inference to be drawn therefrom really exist.—But as the Judge has the right to act on all the uncontradicted facts, it is only when some doubt

is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from a former fact not distinctly sworn to, that he is called upon to submit any question to the jury. I shall only add that in Davis vs. Hardy 6 Barn. and Cr. 225, it is laid down, that when the judge is of opinion either on the plaintiffs shewing, or on the uncontradicted evidence of the defendant that there is probable cause, it is usual to nonsuit the plaintiff.

I shall not act upon this last authority; but resting upon those to which I have above referred at length, seeing that there is observed no conflict of testimony; in the evidence adduced, no contradictory evidence; that the facts proved are altogether uncontradicted, and do not require the aid of a jury to find them; it is my duty to intimate to the jury that the plaintiff has failed to establish in evidence the want of probable cause required to support his action, and that there is no case for the jury, who will therefore record their verdict.

(Signed,) W. BADGLEY,

J. S. C.

The Jury accordingly found for the Defendants.

And before the Court adjourned, as soon as the verdict was recorded, Mr. ABBOTT rose and said:—

I am authorised by the Messrs. Leslie to say that the evidence on behalf of Mr. Hooper, shewing the nature of the advice he received from his Counsel before making the affidavit for *saisie arrêt*, has produced in their minds the conviction which in justice to him they desire publicly to express: that he made the affidavit in question in perfect good faith.

Mr. JOHNSON.—That is very handsome, and ought to put an end to all this.

Mr. LAFLAMME (to Mr. Abbott).—It is a pity you did not think of saying that before.

Mr. ABBOTT.—Oh! we scarcely expected you would appreciate our motive in saying so.

APPENDIX A.

PROVISIONAL ASSIGNMENT.

On this twenty-third day of February, one thousand eight hundred and sixty, Personally came and appeared, Edward Stuart Leslie and Patrick Leslie, (the assignors), The Honorable James Leslie, Alexander Maurice Delisle, and Henry Starnes, (the assignees), which said parties declared as follows:

Whereas the said assignors have become embarrassed in their business and have been compelled to stop payment, and since doing so have been sued by various persons, firms, and corporations, forming part of their creditors:

And whereas the said assignors have considered it advisable, in the interest of their estate and of the creditors thereof, and for their protection, to make an assignment of their estate and effects in the manner and for the purposes and upon the terms and conditions hereinafter mentioned:

Now these presents and we, the said Notaries, witness that upon and for the considerations hereafter mentioned the said assignors have assigned, transferred and made over, and by these presents do assign, transfer, and make over unto the said assignees accepting hereof all their partnership estate and effects, and each and every part, and portion thereof comprising their stock, in trade, (as per schedule,)&c—but the said assignment shall extend also to any debts effects, or securities which may have been accidentally omitted in said Schedule

To have and to hold the same to the assignees or their assigns upon the conditions and for the purposes hereinafter fully detailed and described.

And the said Edward Stuart Leslie individually also hereby assigns, transfers, and makes over to the said assignees, accepting hereof, all his individual estate and effects of every kind and nature whatsoever both real and personal including certain rights and claims in upon and to certain real estate forming the estate and succession of his late mother, a detailed description of which claims and of the individual estate of the said Edward Stuart Leslie is hereto annexed forming Schedule B.

And the said Patrick Leslie individually also hereby assigns, transfers, and makes over to the said assignees accepting hereof all his individual state and effects of every nature and kind whatever both

real and personal, a detailed description of which last mentioned estate is hereto annexed forming Schedule C.

And the said assignors, as well jointly as individually hereby agree and bind themselves to the said assignees and their assigns forthwith and from time to time hereafter on demand to make execute and deliver to the said assignees such formal and valid deeds of sale and transfer to them and their assigns of all the real estate and claim title or pretension to real estate of them the said assignors jointly or individually as may be required by law fully to carry out the intentions hereof. The present assignment is thus made for the considerations upon the terms and conditions and for the purposes following, to wit:

1st. That the said estate and assets may be preserved and taken care of, and prevented from being sacrificed until the negotiable paper upon which the said assignors are only secondarily liable shall have become due, until which time any reliable estimate of the value of the assets of said estate in proportion to its liabilities, will be difficult, if not impossible.

2nd. That the estate and assets of the said assignors may be realized in the manner most beneficial to the interest of the creditors of the said assignors and of each of them: that legal expenses may be lessened; and that no privilege or preference upon or out of such assets may be obtained by any one of such creditors over another or others; and that upon a surrender of all their said assets to their creditors the said Assignors and each of them may obtain a discharge from their present liabilities.

It is therefore hereby agreed by and between the said parties hereto, that the said assignees shall retain in their hands possession and custody the estate and assets real and personal of the said Assignors and of each of them, hereby assigned or intended so to be, until the secondary liabilities of the said assignors shall have matured and during that time shall exercise all due care and diligence in the custody of such estate and assets and in keeping the same covered by Insurance in so far as they may be susceptible of injury by fire, and in realising and collecting so far as possible all debts due to the said firm of Leslie and Company, and in the sale of such of the goods of the said firm hereby assigned, as may be perishable; or as may be so sold at a fair market price and without sacrifice; retaining the proceeds of such collections and sales, to represent the debts which may be so collected and the goods which may be so sold.

That during the said time the said assignees shall fully investigate the position of the affairs of the said firm and within as short time as

may be after the maturity of such secondary liabilities of the said firm shall report to the creditors thereof at a meeting of such creditors to be called for the purpose, the position thereof, and the amount of dividend which in their opinion the said estate and assets will be sufficient to pay to general and ordinary creditors thereof, and the time within which in their opinion such dividend may be realized; and that at such meeting the said assignees shall submit to the said creditors full statements of the grounds of their opinion as to the value of such estate, and all information in their possession respecting the value thereof.

That should the creditors present at such meeting or at any adjournment thereof be of opinion to accept such dividend, payable at such time as the assignees shall recommend, as a composition of their claims against the said firm, and in full discharge and satisfaction thereof, or any other composition or terms which may then be offered to them by the said firm; and should the said assignors then or within a reasonable time thereafter effect a final arrangement with their said creditors concurred in by such a proportion thereof exceeding three fourths thereof in value, as may satisfy the said assignors, for the payment of such composition; then and in that case it shall be the duty of the said assignees, and they hereby agree and bind themselves, forthwith to retransfer and reconvey to the said assignors or to any other person or persons indicated by them for that purpose, the whole of the estate and assets hereby transferred to the said assignees or intended so to be, in the state and condition in which they shall then be, together with all moneys and securities for money belonging to the said estate which shall have been collected or gotten in by the said assignees as the proceeds of the collection of any debts due to, or for the sale of any goods or effects belonging to, the said estate; the whole however subject to the deduction of any and all moneys by the said assignees paid for rent of the stores occupied by the said assignors for wages or salary of their clerks and employés and for the legal expenses incurred or to be incurred in the protection of the said estate and in the execution and completion of the present assignment, and also of all *bonâ fide* expenses to be by the said assignees incurred in the care, management, and administration of the estate and assets hereby transferred to them.

That should the creditors of the said assignors refuse the composition to be so recommended by the said assignees, or should they and the said assignors be unable to agree upon the terms and conditions of such composition or upon any sum of money as a composition of the debts so due them, then and in that case it is hereby agreed by and

between the said parties that the said assignees shall proceed to realise and liquidate the estate and effects hereby assigned to them or intended so to be, and the proceeds of the same to make available for the benefit of the creditors of the said assignors as hereinafter provided, as soon as may be without extraordinary sacrifice thereof.

And it is hereby further agreed that out of the proceeds of the said estate and assets, the assignees shall first pay the rent of the store and warehouse occupied by the said assignors, the wages of the clerks and employés of the said assignors, in so far as the same are privileged: and the legal and other expenses and charges incurred or to be incurred in the protection management and administration of the said estate; and thereafter from time to time and so often as they see fit, declare and pay from and out of the remainder thereof such dividend or dividends to the said creditors as such remainder will enable them to do. Having always due regard to the nature of the rights and claims of such creditors in respect of the particular estate, whether separate or joint upon which such creditors will have the right to rank: and also having due regard to the nature of such claims whether absolute or contingent, and in the event of their being contingent, to the security of the said estate and the conditions thereof should the contingency contemplated in the creation of such debts not occur; with power, however, to such assignees to enter into any compromise with regard to such contingent debt as shall appear to them just and reasonable. And it is hereby further agreed as a condition hereof, that any creditors of the said assignees who shall desire to have the benefit of the present assignment, and to receive his or their share of the proceeds of the said estate and assets, shall have the right so to do, provided always that before any such creditor or creditors shall receive any dividend or sum of money whatever, he or they shall duly make and execute in authentic form a deed by which his or their acceptance of the terms of these presents, and in consideration thereof, his or their discharge of the said assignors shall be fully and validly effected; and the proportion or share in such dividend or dividends of any creditor or creditors who shall refuse or neglect to execute such acceptance and discharge, shall be retained by the said assignees or their assigns, subject to subsequent distribution as assets of the said estate, should such creditor or creditors persist in such refusal.

And it is hereby also further agreed by and between the said parties hereto, that should the creditors of the said assignors be willing to accept the whole of their said estate effects and assets in full discharge of their claims, but should be desirous of themselves appoint-

ing an assignee or assignees to wind up the said estate, that the said hereby named assignees shall forthwith convey the estate and effects of the said assignors, subject to the deductions and privileged claims hereinbefore provided for, to such new assignees; provided always that the said creditors become parties to and accept such new assignment, and in consideration thereof finally and fully discharge the said assignors from all present liabilities.

Signed, E. S. LESLIE,
" P. LESLIE,
" J. LESLIE,
" A. M. DELISLE,
" Hx. STARNES.

Signed, C. C. SPENARD, N. P., JOHN C. GRIFFIN, N. P.